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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

RUDOLFO FIDEL MENDOZA,  
individually and on behalf of a class of  
similarly situated individuals,

Plaintiff,

vs.

GENERAL MOTORS LLC,

Defendant.

Case No. CV 10-2683 AHM (VBKx)

**NEW GM'S REPLY IN SUPPORT  
OF MOTION TO DISMISS FOR  
LACK OF SUBJECT MATTER  
JURISDICTION [F.R.Civ.P.  
12(b)(1)] OR, ALTERNATIVELY,  
TRANSFER TO THE SOUTHERN  
DISTRICT OF NEW YORK FOR  
REFERRAL TO THE  
BANKRUPTCY COURT [28 U.S.C.  
§ 1412]**

Hearing Date: October 25, 2010  
Time: 10:00 a.m.  
Courtroom 14  
Honorable A. Howard Matz

Defendant General Motors LLC ("New GM") respectfully submits this memorandum in reply to plaintiff's opposition to ("Opposition" or "Opp."), and in further support of, New GM's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction or, alternatively, for motion for transfer to the Southern District of New York under 28 U.S.C. § 1412 for referral to the Bankruptcy Court that is handling the bankruptcy case of General Motors Corporation n/k/a Motors Liquidation Company ("Old GM") under 28 U.S.C. § 157(b) ("Motion").

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**PRELIMINARY STATEMENT**

From its very first paragraph, plaintiff's Opposition reads almost like a response to the Rule 12(b)(6) motion that New GM did not file. The point of the Rule 12(b)(1) motion which New GM did file is *not* that this Court should dismiss plaintiff's case because he cannot state a cause of action, but that the issues here presented must instead be submitted to the United States Bankruptcy Court for the Southern District of New York which in a final and binding order (with full res judicata effect) has retained "exclusive jurisdiction" to protect New GM from having to litigate claims which, if proven, would be the responsibility of Old GM.

In July 2009, New GM purchased the assets of Old GM under an Amended and Restated Master Sale and Purchase Agreement ("ARMSPA"), but it did not assume Old GM's liabilities, except for the "Assumed Liabilities" specifically listed in ARMSPA § 2.3(a). Thus, as plaintiff recognizes, *see* Opp., p. 5, the inescapable threshold question in this case is whether the state statutory liabilities he is alleging, if they could be proven, would belong to Old GM or New GM.

The answer to that question requires application and, possibly, interpretation of the terms of the ARMSPA and of the Sale Approval Order in which the Honorable Robert E. Gerber, United States Bankruptcy Judge, (1) approved the ARMSPA under section 363 of the Bankruptcy Code and (2) retained exclusive jurisdiction to implement, enforce and resolve any disputes concerning the ARMSPA and/or the Sale Approval Order.

Accordingly, New GM has moved to dismiss plaintiff's First Amended Complaint *for lack of jurisdiction* or, in the alternative, for transfer to the Southern District of New York and referral to the Bankruptcy Court. Thus, contrary to plaintiff's statement in the first paragraph of his Opposition, New GM is *not* asking this Court "to interpret the provisions [of the ARMSPA] *and dismiss [the] First Amended Complaint ... because ... Plaintiff's claims are not the 'Assumed Liabilities' of new GM.*" Opp., p. 1 (emphasis added). Instead, New GM is asking

1 this Court affirmatively *not* to interpret these documents except insofar as is  
2 necessary to discern that the Bankruptcy Court has exclusive jurisdiction to do so.  
3 That is why New GM did not move in this Court for dismissal under Rule 12(b)(6).

4 Thus, far from “forum shopping” as alleged by plaintiff, New GM is asking  
5 this Court to do nothing more than honor the Bankruptcy Court’s retention of  
6 jurisdiction over an issue – what did New GM buy from Old GM in the section 363  
7 transaction and subject to what liabilities? – which falls squarely within the  
8 Bankruptcy Court’s “core” jurisdiction under the Bankruptcy Code.

9 The ARMSPA and Sale Approval Order embody the single most important  
10 transaction in Old GM’s bankruptcy case. Allowing other courts to interpret these  
11 documents and potentially modify the section 363 transaction after-the-fact by  
12 imposing liabilities on New GM that it did not agree to assume not only would  
13 flout the Bankruptcy Court’s retention of exclusive jurisdiction, but also would  
14 open the door to end-runs of that jurisdiction that could lead to conflicting  
15 adjudications by state and federal courts concerning the assets and liabilities that  
16 were transferred to New GM under the ARMSPA.

17 Such piecemeal rulings would undermine and threaten the integrity of the  
18 bankruptcy process by enabling non-bankruptcy courts to give claimants like  
19 plaintiff (and thousands of alleged class members) preferential treatment at the  
20 expense of a section 363 purchaser (New GM) which bargained specifically  
21 concerning the Old GM liabilities that it would and would not agree to assume  
22 pursuant to a detailed written sale and purchase agreement defining its continuing  
23 obligations. The Bankruptcy Court which approved that agreement is obviously in  
24 the best position to determine what types of liabilities Old GM did or did not pass  
25 on to New GM.

26 And, in fact, in an order issued just last week, Judge Gerber held that he had  
27 exclusive jurisdiction over issues concerning another aspect of the 363 transaction:  
28 Deferred Termination or “Wind-Down” Agreements under which certain GM

1 dealers agreed, in exchange for monetary and other consideration, to terminate  
2 their GM Dealer Sales and Service Agreements no later than October 31, 2010 as  
3 an alternative to outright rejection of those executory contracts under section 365  
4 of the Bankruptcy Code. In several respects, that ruling is instructive.

5 The plaintiff dealership in that case, a California motor vehicle dealer named  
6 Rally Auto Group, Inc. (“Rally”), sought reinstatement of four GM Dealer  
7 Agreements through binding arbitration under Section 747, Consolidated  
8 Appropriations Act 2010, Pub. Law 111-117, 23 Stat. 3034 (2009). The arbitrator  
9 concluded that Rally was entitled to reinstatement of only its Buick, Cadillac and  
10 GMC franchises. Rally then sued to vacate or modify the award, and thereby  
11 avoid its obligation to terminate its Chevrolet Dealer Agreement pursuant to the  
12 terms of the Bankruptcy Court approved Wind-Down Agreement. Rally Auto  
13 Group, Inc. v. General Motors LLC, United States District Court for the Central  
14 District of California, Southern Division, No. SACV 10-01236 DOC (Ex) (the  
15 “California Action”).

16 In response, New GM moved in Bankruptcy Court for an order enforcing the  
17 Wind-Down Agreement and enjoining Rally from, among other things, continuing  
18 to prosecute the California Action. In granting the motion, Judge Gerber had this  
19 to say about the importance of Bankruptcy Court jurisdiction over issues arising  
20 under the ARMSPA and Sale Approval Order:

21 “[T]he bidders of the world that come in to bid for assets in the  
22 bankruptcy court must have knowledge that bankruptcy courts will  
23 stand by the documents as they were then drafted to give the parties to  
24 those agreements the predictability in their relations for which they are  
25 binding and upon which they justifiably rely. The Court in [In re  
26 Eveleth Mines LLC, 312 B.R. 634, 645 n. 14 (Bankr.D.Minn.2004)]  
27 explained: ‘[a]s applied to a sale free and clear of liens, there are also  
28 good policy reasons for making a derivative core-proceeding

1 classification.... Active bidding on assets from bankruptcy estates will  
2 be promoted if prospective purchasers have the assurance that they  
3 may go back to the original forum that authorized the sale, for a  
4 construction or clarification of the terms of the sale that it approved.  
5 Relegating post-sale disputes to a different forum injects an  
6 uncertainty into the sale process, which would dampen interest and  
7 hinder the maximization of value. A purchaser that relies on the terms  
8 of a bankruptcy court's order, and whose title and rights are given life  
9 by that order, should have a forum in the issuing court.”

10 Transcript of Hearing, In re Motors Liquidation Co., No. 09-50026 REG, October  
11 4, 2010.<sup>1</sup> This holding is directly on point here, where New GM seeks protection  
12 against a claim that asserts liabilities which New GM simply did not agree to  
13 assume. As a result of the Bankruptcy Court’s final and binding Sale Approval  
14 Order which in paragraph 71 retains “exclusive jurisdiction” over such issues, this  
15 Court as a matter of res judicata (leave aside normal judicial comity) is simply  
16 without power to decide them. See Met-L-Wood Corp. v. Getkas, 861 F.2d 1012,  
17 1016 (7th Cir.1988) (bankruptcy court’s sale approval order under 11 U.S.C. § 363  
18 is a final order with res judicata effect that can only be challenged on appeal);  
19 Boyer v. Gildea, 2005 U.S.Dist.Lexis 41534 at \*11-12 (N.D.Ind.2005) (“The  
20 important policy of favoring the finality of bankruptcy court orders approving the  
21 sales of debtor assets requires that bankruptcy orders be final judgments for *res*  
22 *judicata* purposes”).

## 23 **ARGUMENT**

### 24 **I. NEW GM IS ONLY LIABLE FOR “ASSUMED LIABILITIES”**

25 Plaintiff claims that New GM is liable under three California statutes based  
26 upon an alleged “design defect” in his 2005 Chevrolet Equinox – a vehicle that

27  
28 <sup>1</sup> A copy of the full transcript of the hearing, including Judge Gerber’s decision is  
attached hereto as Exhibit A.

1 New GM *did not* manufacture or sell. In fact, it is undisputed that New GM did  
2 not manufacture or sell *any* of the vehicles owned by members of the proposed  
3 class. New GM therefore has no liability to the owners of these vehicles *unless* it  
4 specifically agreed to assume such liability in the ARMSPA.

5 New GM believes that the express terms of the ARMSPA and Sale Approval  
6 Order establish that it does not have any such liability. But GM is not asking this  
7 Court to make that determination. Instead, New GM only is asking the Court to  
8 recognize that to the extent that plaintiff has any colorable claim, it unavoidably  
9 depends on application and interpretation of the ARMSPA and thus must be  
10 addressed to Judge Gerber who, under paragraph 71 of the Sale Approval Order,  
11 retains “exclusive jurisdiction to enforce and implement the terms of Order *and to*  
12 *protect [New GM] against any of the Retained Liabilities* [i.e., liabilities that New  
13 GM did not assume under the Order] or the assertion of any lien, claim,  
14 encumbrance or other interest, of any kind or nature whatsoever, against the  
15 Purchased Assets [which New GM purchased from Old GM]”) (emphasis added).

16 New GM’s lack of liability and Judge Gerber’s jurisdiction to determine  
17 what “Assumed Liabilities” it specifically agreed to accept both follow from the  
18 very nature of a “sale free and clear of liabilities” under section 363 of the  
19 Bankruptcy Code. The obvious goal of such a sale is to obtain monetary value for  
20 the benefit of the debtor’s estate and creditors by selling valuable assets of the  
21 estate *without the attendant liabilities*. See Sale Approval Order, ¶ 7 (“Except for  
22 the Assumed Liabilities, ... the Purchased Assets shall be transferred to [New GM]  
23 free and clear of all liens, claims, encumbrances, and other interests of any kind or  
24 nature whatsoever ... including rights or claims based on any successor or  
25 transferee liability”).

26 To the extent that liabilities pass to the purchaser, even on a limited basis,  
27 they lessen the purchase price and the value to the estate *pro tanto*. It is therefore  
28 very important, both to a section 363 purchaser and to the debtor, to identify



1 specifically what types of liabilities will be assumed by the purchaser and which  
2 will remain with the debtor. Here, in the largest industrial bankruptcy case in  
3 history, the issue of assumed liabilities was negotiated in great detail and resulted  
4 in very detailed definitions of the categories of liabilities which New GM did and  
5 did not assume. *See* ARMSPA § 2.3(a) (Assumed Liabilities); *id.*, § 2.3(b)  
6 (Liabilities retained by Old GM); Sale Approval Order, ¶ 46 (“except for the  
7 Assumed Liabilities expressly set forth in the [ARMSPA], ... [New GM] ...shall  
8 not have any liability for any claims that arose prior to the Closing Date, relates to  
9 the production of vehicles prior to the Closing Date, or otherwise is assertable  
10 against [Old GM] ... prior to the Closing Date”). The teaching of the Eveleth  
11 Mines case, quoted above, is that construction of a 363 sale order to determine  
12 what assets and liabilities changed hands is a matter for the Bankruptcy Court.

13 Simply put, New GM should not be saddled with Old GM liabilities that it  
14 did not agree to assume and, indeed, should not be required to litigate claims  
15 asserting such liabilities in non-bankruptcy courts when Judge Gerber has express  
16 and exclusive power to resolve such claims. *See* Sale Approval Order, ¶ 71.

## 17 **II. PLAINTIFF’S CLAIMS ARE NOT FOR “ASSUMED LIABILITIES”**

18 As discussed above, New GM is liable to plaintiff only to the extent that this  
19 action involves liabilities which New GM expressly agreed to assume under  
20 ARMSPA § 2.3(a). Only two categories of the “Assumed Liabilities” defined in  
21 that section are even potentially relevant, and in New GM’s view neither applies  
22 here. But the final arbiter on that issue is, and must be, Judge Gerber.

### 23 **A. Plaintiff’s Claims Are Not for Assumed “Product Liabilities”**

24 Plaintiff first asserts that New GM is liable under California’s Consumers  
25 Legal Remedies Act (“CLRA”), Civ. Code § 1750 *et seq.*, and Unfair Competition  
26 Law (“UCL”), Bus. & Prof. Code § 17200 *et seq.*, because it allegedly assumed  
27 “product liabilities” under ARMSPA § 2.3(a)(ix). *See, e.g.,* Opp., p. 6. But neither  
28 plaintiff’s CLRA claim nor his UCL claim asserts any claim for “product liability”

1 either in the general sense (strict liability for *personal injury* or *property damage*  
2 based on alleged product defects) or under the more specific definition of “Product  
3 Liabilities” contained in ARMSPA § 2.3(a)(ix):

4 “all liabilities to third parties for death, personal injury, of other  
5 injury to Persons or damage to property caused by motor vehicles ...  
6 manufactured, sold or delivered by [Old GM] (collectively, “Product  
7 Liabilities”), which arise directly out of death, personal injury or other  
8 injury to Persons or damage to property caused by accidents or incidents  
9 first occurring on or after the Closing Date and arising from such motor  
10 vehicles’ operation or performance....”

11 Thus, to be an Assumed Liability under section 2.3(a)(ix), a claim must (1) be for  
12 death, personal injury or property damage caused by motor vehicles and (2) arise  
13 directly from accidents or incidents occurring on or after the Closing Date.

14 Plaintiff’s allegations satisfy neither of these requirements.

15 ***1. Plaintiff Is Suing for Non-Disclosure, Not Property Damage***

16 The First Amended Complaint does not include any claim for personal  
17 injury or “property damage caused by motor vehicles.” Instead, it seeks monetary  
18 and injunctive relief to remedy alleged economic losses caused by claimed  
19 violations of disclosure statutes relating to the condition of vehicles sold prior to  
20 the Old GM bankruptcy. *See* FAC, ¶¶ 83, 86, 90-91, 103, 109-10, 111b, 111d.  
21 Neither economic loss caused by an alleged design defect nor violation of statutory  
22 disclosure or reimbursement obligations is included in the categories of assumed  
23 liabilities defined in section 2.3(a), including section 2.3(a)(ix) which provides for  
24 New GM to assume liability *only* for personal injury and property damage.

25 To be sure, plaintiff argues that the FAC “is replete with *allegations* of  
26 ‘property damage’” (Opp., p. 6), but he is not *suing* for property damage caused by  
27 motor vehicles. Instead, he is suing for money damages, restitution and injunctive  
28 relief based on alleged violations of the CLRA and UCL. If, as plaintiff argues,

1 New GM assumed liability for violations of consumer statutes, it certainly is not  
2 apparent on the face of section 2.3(a)(ix), and there is certainly nothing elsewhere  
3 in the text of the ARMSPA or Sale Approval Order indicating that New GM  
4 intended to do so. In fact, the exact opposite is true. ARMSPA § 2.3(b)(xvi)  
5 confirms in a seemingly straightforward manner that Old GM retains (and  
6 therefore New GM did not assume) “all Liabilities arising out of, related to or in  
7 connection with any implied warranty or other implied obligation arising under  
8 statutory or common law without the necessity of an express warranty.” That is  
9 why it is mandatory that any alleged ambiguity in the contract language be  
10 resolved by the Bankruptcy Court, which approved and possesses very detailed  
11 knowledge of the ARMSPA and the overall intent of the parties.

12 Indeed, according to plaintiff, Judge Gerber already has addressed this issue  
13 in his opinion which accompanied issuance of the Sale Approval Order:

14 “As Judge Gerber of the Bankruptcy Court noted in ruling on the sale  
15 of assets that gave rise to New GM and objections thereto, the  
16 Assumed Liabilities include ‘*all product liability claims arising from*  
17 *accidents or other discrete incidents arising from operation of GM*  
18 *vehicles occurring subsequent to the closing ... regardless of when the*  
19 *product was purchased.*’” Opposition, p. 8 (emphasis by plaintiff).

20 GM believes that Judge Gerber was using the term “product liability claims” in its  
21 normal sense to refer to strict liability for personal injuries or property damage  
22 caused by a design or manufacturing defect rather than to violation of consumer  
23 disclosure statutes, but if there is any doubt about the scope of the quoted sentence  
24 or the extent of the liabilities which New GM agreed to assume, Judge Gerber  
25 obviously is best situated to interpret his own words.

26 **2. Plaintiff’s Claims Did Not Arise After the Closing Date**

27 Plaintiff argues that New GM is liable on his statutory claims because they  
28 are claims for property damage “arising directly from accidents or incidents or

1 other discrete occurrences that happen on or after the Closing Date.” Opp., pp. 6.  
2 Because plaintiff first experienced a water leakage problem after the Closing Date,  
3 they say, the problem did not “manifest itself” until after that date; therefore, they  
4 say, New GM is liable under ARMSPA § 2.3(a)(ix).

5 This argument falls first, as explained above, because plaintiff’s claim is not  
6 for property damage at all but for economic loss stemming from alleged violation  
7 of consumer disclosure statutes. But even beyond that initial fatal flaw, plaintiff’s  
8 argument fails because the duty of disclosure of the alleged “known defect” under  
9 the cited consumer statutes arose if at all *prior to the Closing Date regardless of*  
10 *when plaintiff or any other specific owner experienced a water leakage problem*.  
11 In other words, the alleged liability did not “arise from accidents, incidents or other  
12 discrete incidents” either before or after the Closing Date, but arose instead from  
13 alleged knowledge of the defect before the Closing Date that assertedly gave rise to  
14 a duty of disclosure on the part of Old GM before that date. Although plaintiff  
15 alleges that New GM became aware of the alleged defect on or shortly after the  
16 Closing Date, it had no contractual relationship with Equinox and Torrent owners  
17 at that time, aside from its express warranty obligations assumed under ARMSPA  
18 § 2.3(a)(vii)(A), *see* Part II-B *infra*, so there is simply no basis for any claim that it  
19 owed these owners any duty of disclosure. Therefore, plaintiff’s “manifestation”  
20 argument reduces to nothing more than an attempt to impose forbidden successor  
21 liability on New GM based on Old GM’s alleged failure to disclose a claimed  
22 defect before the Closing Date. *See* Sale Approval Order, ¶ 46.

23 **B. Plaintiff’s Claims Are Not for Assumed Warranty Liabilities**

24 ARMSPA § 2.3(a)(vii)(A) delineates the *only* warranty liabilities which  
25 New GM agreed to assume:

26 “all Liabilities arising under express written warranties ... that  
27 are specifically identified as warranties and delivered in connection  
28

1 with the sale of new, certified used or pre-owned vehicles ...  
2 manufactured or sold by [Old GM]....”

3 Paragraph 56 of the Sale Approval Order amplified the limited nature of the  
4 assumed warranty obligations:

5 “[New GM] is assuming the obligations of [Old GM] pursuant to and  
6 *subject to conditions and limitations contained in* their express written  
7 warranties.... [New GM] is not assuming responsibilities for  
8 Liabilities contended to arise by virtue of other alleged warranties,  
9 including implied warranties and statements in materials such as,  
10 without limitation, individual customer communications, owner’s  
11 manuals, advertisements, and other promotional materials, catalogs,  
12 and point of sale materials.” (Emphasis added.)

13 These provisions clearly establish that the only warranty liability that New GM  
14 assumed was liability under Old GM’s standard limited “repair or replace”  
15 warranties. Under these warranties, the *exclusive* remedy is free-of-charge repair  
16 of defects in materials and workmanship upon presentation of the vehicle to an  
17 authorized dealer within the warranty period. *See* Request for Judicial Notice,  
18 Exhibit D. All other remedies are specifically excluded.

19 It comes as no surprise, therefore, that plaintiff admits he is not suing GM  
20 for breach of express warranty, *see* Opp., p. 5, despite alleging that GM “refused to  
21 cover the problem under warranty, as it was required to do under the [ARMSPA].”  
22 *See* FAC, ¶¶ 13-14, 45, 57, 60. Instead of seeking free repairs under the warranty,  
23 plaintiff seems to have made the tactical choice to allege that the standard limited  
24 warranty *does not* cover water leaks because lack of warranty coverage is an  
25 essential predicate for his MVWAP claim that in those circumstances in which GM  
26 dealers did provide free repairs for water leaks, they did so in alleged compliance  
27 with a MVWAP “adjustment program” which Old GM allegedly created by  
28 “enlarging” the warranty. *See* Opp., p. 11.

1           **C.     New GM Did Not Assume Any Other Relevant Liabilities**

2                   **1.     *CLRA and UCL Claims***

3           Vehicle manufacturers are subject to a variety of legal claims based on their  
4 manufacture and distribution of new vehicles to their dealers for sale or lease to  
5 retail customers. These include not only strict product liability claims for personal  
6 injury or property damage and claims for breach of standard vehicle warranties, all  
7 of which New GM specifically agreed to assume, but also other types of claims  
8 including breach of implied warranties and warranties-by-description, claims of  
9 common law misrepresentation and omission, and claims for violation of state  
10 consumer laws such as California’s CLRA, UCL and MVWAP statutes. The  
11 ARMSPA conspicuously excluded the latter group of claims.

12           Because New GM did not manufacture plaintiff’s Chevrolet Equinox – or  
13 *any* Equinoxes or Pontiac Torrents – it is not liable on any of these types of claims  
14 *unless* it specifically agreed to assume such liability. Because plaintiff’s CLRA,  
15 UCL and MVWAP do not fall within any of the Assumed Liability categories set  
16 out in ARMSPA § 2.3(a), New GM, very simply, has no liability to plaintiff  
17 because it did not manufacture or distribute his vehicle and therefore, unlike Old  
18 GM, is not subject to these types of claims.

19           Bolstering this conclusion, ARMSPA § 2.3(b)(xvi) explicitly excludes from  
20 the liabilities assumed by New GM “all Liabilities arising out of, related to or in  
21 connection with any (A) implied warranty ***or other implied obligation arising***  
22 ***under statutory*** or common ***law*** without the necessity of an express warranty or (b)  
23 allegation, statement or writing by or attributable to [Old GM].” ARMSPA  
24 (emphasis added).<sup>2</sup>

25           <sup>2</sup> To be sure, plaintiff argues that his claims do not fit within this exclusion  
26 because, he claims, he is suing on express rather than implied obligations. But  
27 plaintiff’s statement that his claims involve “*express obligations*” that “transcend  
28 the law of warranty” confirms that these claims regardless of whether they fit  
within the exclusion do not fit within the section 2.3(a)(vii)(A) definition of  
assumed warranty liabilities because they *transcend* – i.e., are outside the bounds  
of – warranty law. Opp., p. 8, n. 6 (quoted emphasis in original).

1 Further, paragraph 46 of the Sale Approval Order provides that “[e]xcept for  
2 the Assumed Liabilities expressly set forth in the [ARMSPA] ... [New GM] ...  
3 shall [not] have any liability for any claim that arose prior to the Closing Date,  
4 ***relates to the production of vehicles prior to the Closing Date***, or otherwise is  
5 assertable against [Old GM] ... prior to the Closing Date....” Claims for non-  
6 disclosure of an alleged design defect clearly “relate to the production of vehicles  
7 prior to the Closing Date” and therefore fall squarely within the ambit of this  
8 prohibitory language. And, if there were any reason for doubt, the next sentence of  
9 paragraph 46 clearly puts to rest any conceivable claim that New GM has liability  
10 based on Old GM’s failure to disclose the alleged defect:

11 “***Without limiting the foregoing, [New GM] shall not have any***  
12 ***successor, transferee, derivative, or vicarious liabilities of any kind***  
13 ***or character for any claims, including, but not limited to, under any***  
14 ***theory of*** successor or transferee liability, de facto merger or  
15 continuity ... and ***products ... liability***, whether known or unknown as  
16 of the Closing, now existing or hereafter arising, asserted or  
17 unasserted, fixed or contingent, liquidated or unliquidated.”

18 Based on plaintiff’s allegations (which New GM does not admit), as of the Closing  
19 Date he asserts that he had an unasserted “products liability” claim against Old GM  
20 for alleged non-disclosure of the claimed design defect. Under the quoted  
21 language, however, New GM clearly has no successor or transferee liability based  
22 on Old GM’s failure to disclose the alleged defect.

23 Plaintiff not only has no “products liability” or “warranty” claim, but he is  
24 subject to a Bankruptcy Court injunction prohibiting him from making such claims  
25 against New GM. Sale Approval Order, ¶ 47 (“Effective upon the Closing ...all  
26 persons and entities ***are forever prohibited and enjoined from commencing or***  
27 ***continuing in any manner any action ... against [New GM] ...with respect to any***  
28 ***(i) claim against [Old GM] other than Assumed Liabilities***) (emphasis added).

1 To be sure, plaintiff argues that New GM is liable on his statutory claims  
2 because it has “continued” Old GM’s misconduct. This argument is circular,  
3 however, because it assumes incorrectly that New GM has the same obligations  
4 and liabilities as Old GM, the manufacturer of plaintiff’s vehicle. It does not.  
5 Because it did not manufacture Chevrolet Equinoxes or Pontiac Torrents, New GM  
6 *does not* have normal manufacturer liabilities. Instead, the only source of potential  
7 liability to plaintiff on the part of New GM is the ARMSPA, so any liabilities to  
8 plaintiff other than those set forth in section 2.3(a) belong to Old GM.

9 Further, plaintiff’s argument that New GM allegedly learned of the claimed  
10 water leak defect when it purchased Old GM’s assets in July 2009, and therefore  
11 was obliged under the CLRA and UCL to disclose the claimed defect to plaintiff, is  
12 missing an essential element. At the time that the section 363 transaction closed on  
13 July 10, 2009, New GM had no relationship with plaintiff *except* for its agreement  
14 to perform Old GM’s obligations under its standard express warranty.

15 If, as plaintiff apparently believes, Old GM knew of the alleged defect and  
16 failed to make required disclosures, plaintiff at the time that the section 363  
17 transaction closed *already had an actionable claim against Old GM that was ripe*  
18 *for adjudication*. But New GM did not have any liability as the vehicle’s  
19 manufacturer and under the ARMSPA it did not agree to assume Old GM’s  
20 liability for alleged non-disclosure, which accordingly remains with Old GM.  
21 Thus, plaintiff’s nondisclosure claim against New GM reduces to a naked attempt  
22 to impose successor or transferee liability – a result which paragraph 46 of the Sale  
23 Approval Order explicitly forbids. And, again, any arguments to the contrary must  
24 be made to the Court which entered that order, the Bankruptcy Court for the  
25 Southern District of New York.

## 26 **2. MVWAP Claims**

27 Virtually the same analysis applies to plaintiff’s MVWAP claims. MVWAP  
28 provides that *the manufacturer* of a vehicle (here, Old GM) cannot expand or



1 extend coverage under its standard warranty, except on an *ad hoc* basis, without  
2 notifying all vehicle owners of the availability of the expanded coverage and  
3 reimbursing owners who already have paid for repairs of the “condition” that is the  
4 subject of the alleged “adjustment program.” Civ. Code §§ 1795.90(d), 1795.92.  
5 The basis for plaintiff’s MVWAP claim in this case are two versions of a  
6 Technical Service Bulletin issued by Old GM which describes how to diagnose  
7 and remedy water leak problems *but which says absolutely nothing about whether*  
8 *repair of these problems is covered under the warranty or, if not, whether the*  
9 *repairs should be provided to customers free-of-charge.*

10 While New GM believes that these Technical Service Bulletins *did not*  
11 create any “adjustment program” within the meaning of Civ. Code § 1795.90(d),  
12 the important point here is that the MVWAP violation, if there was one, was  
13 complete at the time these bulletins were adopted in October 2008 and January  
14 2009, *before the Old GM bankruptcy filing*. In other words, if there was an  
15 obligation under MVWAP to provide statutory notice to Equinox and Torrent  
16 owners of a claimed defect which, obviously, “relate[d] to the production of  
17 vehicles prior to the Closing Date” (*see* Sale Approval Order, ¶ 46), Old GM had  
18 that obligation and had breached it long before New GM negotiated to purchase its  
19 assets. Because New GM did not manufacture these vehicles, and did not assume  
20 MVWAP liability for them in the ARMSPA,<sup>3</sup> it could only have MVWAP liability  
21 as a successor or transferee. But ARMSPA and the Sale Approval Order expressly  
22 protect New GM from such liability. *See id.*

23 Plaintiff also makes a spurious claim that New GM expressly assumed  
24 liability under MVWAP because this statute allegedly is “similar” to the National

25 <sup>3</sup> Plaintiff does not and cannot argue that a violation of MVWAP falls within New  
26 GM’s assumed warranty liability under section 2.3(a)(vii)(A) since, by definition,  
27 providing coverage which *expands* or *enlarges* the limited coverage provided by  
28 the standard express warranty is not coverage that “arises out of” that warranty.  
*See also* Sale Approval Order, ¶ 56 (“[New GM] is assuming the obligations of  
[Old GM] pursuant to and subject to conditions and limitations contained in their  
express written warranties....”).

1 Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.* (the “Safety  
2 Act”). To be sure, ARMSPA § 6.15(a) and the Sale Approval Order (§ 17) provide  
3 that New GM after the Closing Date “shall comply with the *certification, reporting*  
4 *and recall requirements* of the National Traffic and Motor Vehicle Safety Act ...  
5 and similar Laws ... to the extent applicable in respect of vehicles and vehicle  
6 parts manufactured and distributed by [Old GM]” (emphasis added).

7 Consistent with the emphasized language, however, the Safety Act is only a  
8 certification, reporting and recall statute, not a consumer disclosure statute. It  
9 requires manufacturers to certify compliance with safety standards before  
10 marketing vehicles to the public. 49 U.S.C. §§ 30111, 30112, 30115. It directs the  
11 National Highway & Traffic Safety Administration to investigate safety issues and,  
12 if necessary, order vehicle recall campaigns. 49 U.S.C. §§ 30118-20, 30163.

13 But the Safety Act *does not* require manufacturers like GM to notify retail  
14 customers when it issues a Technical Service Bulletin or to provide repairs *unless*  
15 *there is a recall*. And by quite carefully limiting the obligation in question to  
16 “certification, reporting and recall requirements,” the drafters of the ARMSPA  
17 made it quite clear that New GM was not assuming responsibility for claims like  
18 those plaintiff is asserting here.

19 In marked contrast to the Safety Act, MVWAP is not a safety certification or  
20 recall statute; instead, it requires consumer notification and, sometimes, repair  
21 reimbursement, if and when a manufacturer creates an “adjustment program”  
22 *whether or not there is a recall or, indeed, any safety issue at all*.

23 Thus, the Safety Act and MVWAP are in no sense “similar Laws” and New  
24 GM therefore cannot be held to have assumed MVWAP liabilities under ARMSPA  
25 § 6.15(a) or paragraph 17 of the Sale Approval Order. And, once again, if there is  
26 even a smidgen of doubt, the issue falls squarely within Judge Gerber’s exclusive  
27 jurisdiction to determine what liabilities New GM agreed to assume under these  
28 provisions.

1 **III. THE BANKRUPTCY COURT HAS “CORE” JURISDICTION**

2 The authorities cited in the moving papers (pp. 11-13), show that the  
3 Bankruptcy Court has “core” jurisdiction to enforce, interpret and resolve disputes  
4 concerning sales free and clear of liens under section 363 of the Bankruptcy Court.  
5 Judge Gerber in his Rally decision bolstered this conclusion with still more  
6 citations that directly address this point:

7 “... I find that this is a core matter. Under 28 U.S.C., Section  
8 157(a)(2)(n), core matters include, with exceptions not relevant here,  
9 orders approving the sale of property. The 363 sale order and my  
10 approval of the wind-down agreement documented the outcome of  
11 those core proceedings. And a proceeding such as the motion now  
12 before me which seeks relief predicated on a ‘retained jurisdiction’  
13 clause in my order resolving a core matter is a core matter as well.  
14 The decision in Eveleth Mines, 312 B.R. at pages 644 to 645 is  
15 directly on point.... The Second Circuit has held similarly. It’s held  
16 that bankruptcy courts are empowered to enforce the sale order that  
17 they enter and to protect the rights which were established by the sale  
18 order. See Millenium Seacarriers, 419 F.3d at 97; and Petrie Retail,  
19 304 F.3d at 229-30.<sup>4</sup> Petrie Retail is particularly instructive because it  
20 also dealt with a dispute between two nondebtors addressing rights  
21 that were created by the sale order....”

22 Transcript of Hearing, October 4, 2010, pp. 46-47.<sup>5</sup>

23  
24 <sup>4</sup> Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.), 419 F.3d  
25 93 (2d Cir.2005); Luan Investment S.E. v. Franklin 145 Corp. (In re Petrie Retail),  
304 F.3d 223 (2d Cir.2002)

26 <sup>5</sup> Plaintiff feebly attempts to distinguish Eveleth Mines on the grounds that one of  
27 the litigants initially had consented to Bankruptcy Court jurisdiction but then  
28 sought to withdraw its consent. Opp., pp. 20-21. But it is the most fundamental  
principle of federal jurisdiction that the same cannot be created by consent. And  
the two Second Circuit decisions certainly dispatch any claim that interpretation of  
a bankruptcy court’s “core” order is not itself a core matter.

1 The two Winn decisions attached as Exhibits to plaintiff's Opposition do not  
2 support any contrary conclusion. Each involved purely state law issues between  
3 non-diverse parties as to which bankruptcy issues arose only by way of defense.  
4 The district court's remand for lack of federal question jurisdiction has no  
5 relevance in this case, where the plaintiff is directly asserting against New GM  
6 claims on obligations that remain with the bankrupt, Old GM, in direct violation of  
7 paragraph 47 of the Sale Approval Order issued by Judge Gerber.

8 **IV. THE ALTERNATIVE TRANSFER MOTION IS MERITORIOUS**

9 If for any reason the Court is not satisfied that it lacks subject matter  
10 jurisdiction as a consequence of the Bankruptcy Court's retention of *exclusive*  
11 jurisdiction in the Sale Approval Order, New GM respectfully submits that for the  
12 reasons stated in the moving papers, the action should be transferred under 28  
13 U.S.C. § 1412 for referral to the Bankruptcy Court under 28 U.S.C. § 157(b),  
14 consistent with the Bankruptcy Court's indisputable "core" jurisdiction concerning  
15 the section 363 transaction.

16 **CONCLUSION**

17 For all the reasons stated, defendant General Motors LLC respectfully urges  
18 that this Court grant its motion to dismiss this action for lack of subject matter  
19 jurisdiction or, in the alternative, transfer the action pursuant to 28 U.S.C. § 1412  
20 to the United States District Court for the Southern District of New York for  
21 referral to the Bankruptcy Court pursuant to 28 U.S.C. § 157(b).

22 Dated: October 11, 2010

GREGORY R. OXFORD  
ISAACS CLOUSE CROSE & OXFORD LLP

23  
24 By: [s] Gregory R. Oxford  
25 Gregory R. Oxford  
26 Attorneys for Defendant  
27 General Motors LLC  
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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

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In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.

f/k/a General Motors Corporation, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 4, 2010

3:06 PM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

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HEARING re Motion of General Motors LLC Pursuant to 11 U.S.C.  
§§ 105 and 363 to Enforce 363 Sale Order and Approved Deferred  
Termination (Wind-Down) Agreement

Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning -- or afternoon. Have seats, please. All right. GM. Motors Liquidation Company. Rally Motors. Mr. Lederman, do we have some preliminary matters that I had become unaware of?

MR. LEDERMAN: No, Your Honor, we don't. The only matter before you is a matter that you just introduced. So I was just going to introduce the parties and turn over the lectern to them.

THE COURT: All right. Well, I know Mr. Steinberg and Mr. Snyder. Why don't the remainder of you folks introduce yourselves.

MR. DAVIDSON: Scott Davidson from King & Spalding --

THE COURT: All right.

MR. DAVIDSON: -- for New GM.

MR. OXFORD (TELEPHONICALLY): Greg Oxford, Isaac Clouse --

MR. BLATT: Steven Blatt from Bellavia --

THE COURT: Just a minute, please. First, I need the folks in the courtroom to introduce themselves.

MR. OXFORD: Okay, Your Honor.

THE COURT: And then if people are on the phone, I'm going to have to ask that they defer to people in the courtroom unless people in the courtroom hand off to them.

1 MR. BLATT: Steve --

2 THE COURT: All right. Just a minute, please,  
3 gentlemen.

4 MR. BLATT: Yes, Your Honor.

5 THE COURT: All right. With Mr. Snyder?

6 MR. BLATT: Yes.

7 MR. SNYDER: Yes, Your Honor. I'm sorry. Go ahead.

8 MR. BLATT: Steven Blatt, Bellavia Gentile, 200 Old  
9 Country Road, Mineola, New York, on behalf of Rally Auto Group.

10 THE COURT: Right, Mr. Blatt. Okay.

11 THE COURT: Now, is there a gentleman on the phone  
12 who wanted to introduce himself?

13 MR. OXFORD: Yes, Your Honor. It's Greg Oxford,  
14 Isaac Clouse Crose & Oxford also appearing with Mr. Steinberg  
15 on behalf of General Motors LLC.

16 THE COURT: All right, Mr. Oxford. Okay. Gentlemen,  
17 make your presentations as you see fit. But I'm going to need  
18 you to address the following needs and concerns. But first,  
19 let me lay on my frustration with you guys, both sides. I  
20 cannot, for the life of me, understand, Mr. Snyder and Mr.  
21 Blatt, why you can't follow the requirements of my case  
22 management orders and give me a table of cases and table of  
23 authorities as those rules require in baby talk. When I'm  
24 trying to compare the two submissions and see what you guys  
25 said about a particular case or, for that matter, how you

1 organized your arguments, that is a source of incredible  
2 difficulty and frustration for me. And, Mr. Steinberg and Mr.  
3 Oxford -- Mr. Oxford, I think you at least have been in this  
4 case before. How many times have I said that I don't want to  
5 use -- see the word "passum" especially when it refers to the  
6 most important case in your whole brief on a lot of these  
7 issues? I'm not expecting a response now. You can address it  
8 when it's your turn.

9 Gentlemen -- Mr. Snyder and Mr. Blatt, if you want to  
10 make your subject matter jurisdictions, you can, but it doesn't  
11 seem to me that this is about subject matter jurisdiction in  
12 any way, shape or form. Frankly, I think you missed the boat  
13 when you were talking about related-to jurisdiction. It seems  
14 to me that this is a poster child for arising-in jurisdiction  
15 and the principle that bankruptcy judges have the authority to  
16 enforce their own orders. And when an agreement says that the  
17 bankruptcy court will have exclusive jurisdiction to deal with  
18 a particular matter and then the order implements that, I have  
19 some trouble seeing how it can be to the contrary. If you  
20 nevertheless want to continue to the contrary, you got to help  
21 me with Petrie Retail and Millenium Seacarriers on those  
22 points.

23 Now, I sense that both sides agree that there is no  
24 right of judicial review under the Dealer Arbitration Act and  
25 that the Federal Arbitration Act applies only to contractual

1 agreements to arbitrate. So therefore, we're on a little bit  
2 of -- or totally implied remedies if and to the extent they  
3 exist. Now, Mr. Steinberg, I want to see whether your argument  
4 proves too much. And you can help me with that if I posit to  
5 you a situation where the arbitrator is taking bribes or he's  
6 taking an ex parte communication because my belly would tell me  
7 that even if there weren't an expressed right of judicial  
8 review in that situation that Rally Motors, if it were on the  
9 losing end of that type of situation and, of course, if it came  
10 to me, could come and say, Judge, I need relief from that kind  
11 of thing. But, of course, Mr. Snyder and Mr. Blatt, that isn't  
12 what you're alleging here. In essence, you're alleging that  
13 the arbitrator made an error of law. And you haven't shown me  
14 any case in which the arbitrator was told that he had to deal  
15 with these franchise agreements double or nothing. And it  
16 strikes me as a garden variety claim of legal error. So help  
17 me if I'm wrong on that.

18 Now, I don't know how many times I and the other  
19 bankruptcy judges in this district have had 363 orders and  
20 confirmation orders provide for continuing jurisdiction  
21 typically to follow up on the implementation of things that  
22 were in the sale order and in the plan or agreements that were  
23 provided under either. Counterparties come into the court all  
24 the time putting their money on the line to get benefits by  
25 dealing with the bankruptcy court. And that's an important

1 reason, as at least one of the cases that was quoted to me  
2 says, why we have provisions of this character. And I need  
3 your help in understanding why I should say "Never mind" to  
4 provisions of that type. But if there is authority for some  
5 kind of implied judicial review that I, in contrast to a  
6 district judge exercising diversity jurisdiction, could issue,  
7 or even if it were deemed to be 1331 federal question  
8 jurisdiction -- though I don't see the provision of the U.S.C.  
9 under which the federal right arises. I mean, I see why you  
10 could compel GM to arbitrate but New GM didn't quarrel with  
11 your right to arbitrate that I need help on that.

12 So, Mr. Snyder, will it be you or Mr. Blatt?

13 MR. SNYDER: It'll be me, Your Honor.

14 THE COURT: Okay.

15 (Pause)

16 MR. SNYDER: Your Honor, as I think the analogy for  
17 our purposes or the point where we start is the AAA commercial  
18 rules. And I focus on those, Your Honor, only because, as the  
19 Court pointed out, I don't think anyone disputes that when both  
20 parties sat down to the arbitration that the commercial rules  
21 apply. Now, GM states that it objected to the use of the  
22 commercial rules. But be that as it may, the scheduling order,  
23 in particular, paragraph 1, which is annexed to our objection  
24 as Exhibit F, specifically states that the commercial rules  
25 apply. And one of those rules, Your Honor, is 48(c) which we

1       relied on extensively in our papers but it states, and I  
2       quote -- it's short: "Parties to an arbitration under this  
3       rule shall be deemed to have consented. A judgment upon the  
4       arbitration award may be entered into any federal, state or  
5       court of competent jurisdiction." Now it doesn't say they have  
6       to agree. It says that they've deemed to have consented. And  
7       so our argument is, Your Honor, that if the AAA commercial  
8       rules apply and GM is deemed to have consented then, naturally,  
9       there is a -- the arbitration award is final and binding and  
10       there has to be a right of judicial review under the terms of  
11       48(c). Now we cited to the Idea Nuova case for the proposition  
12       that although that was a contract case, where the contract is  
13       silent as to whether the rights of judicial review apply, the  
14       Courts will impute 48(c) not because the parties agreed to  
15       arbitrate, Your Honor, but because by going forward with the  
16       arbitration, because the commercial rules themselves apply,  
17       they're deemed to have consented to both the arbitration and  
18       the entry of a final judgment. And, Your Honor, that's based  
19       solely on facts that are not in dispute.

20               THE COURT: Mr. Oxford, do you want to mute your  
21       phone, please?

22               MR. OXFORD: I'm not sure I know how to do that. We  
23       could --

24               THE COURT: All right. CourtCall, mute them. Go  
25       ahead, Mr. Snyder.



1 MR. OXFORD: I didn't hear you, Your Honor. I'm  
2 sorry.

3 THE COURT: I'm telling CourtCall to mute you, Mr.  
4 Oxford. Go ahead, Mr. Snyder.

5 MR. SNYDER: Thank you, Your Honor. Now we agree,  
6 Your Honor, as GM has pointed out that the Dealer Arbitration  
7 Act is silent as to judicial review. But we contend in  
8 addition to the AAA commercial rules giving the federal court  
9 subject matter jurisdiction that, as Your Honor pointed out,  
10 that if a federal question presents itself under 28 U.S.C. 1331  
11 then the California district court can rely on that federal  
12 question to possess subject matter jurisdiction. And that  
13 federal question is presented here, to wit. Is the removal of  
14 a Chevrolet brand the granting of a "covered dealership" as  
15 that term is defined under 747(a) and (d)? It's stated  
16 specifically, Your Honor, in Rally's statement. Does the  
17 removal of a Chevrolet brand constitute a "covered dealership"?  
18 So we have a federal statute that Rally is asking a federal  
19 court to interpret and we have the Vaden case which I cite to  
20 at -- and -- 129 S. Ct. 1262. In that case, the Supreme Court  
21 held that a federal court could look through the arbitration,  
22 Your Honor, to determine whether the controversy in question  
23 arises under the federal law so that the court has federal  
24 question jurisdiction. That's all we're asking the federal  
25 court to do. Interpret a federal statute on a federal

1 question.

2 And in addition, Your Honor, we believe the federal  
3 court has jurisdiction for the issue that Your Honor has raised  
4 and is the most troubling, at least to me, that there is no  
5 right to judicial review. GM doesn't cite to any federal  
6 statute, while may be silent or limited, that did not allow for  
7 judicial review. Which goes right to the due process argument  
8 and the constitutionality of the statute itself.

9 Your Honor, the arbitrator didn't have to take  
10 bribes. Let's just say we end this hearing and regardless of  
11 what happens GM says, I'm not reinstating you. I don't care  
12 what Judge Gerber says or anyone else says.

13 THE COURT: Well, isn't that the easier case because  
14 wouldn't you, Mr. Snyder, be able to come back to me in about  
15 ten minutes and say that New GM isn't complying with the  
16 arbitration award? And to the extent that I understood your  
17 48(c) argument, the language is "deemed to have consented to  
18 enforcement". And if you say -- let's take what I understand  
19 to be the case. You won three-quarters of -- or your client  
20 won three-quarters of the arbitration before the arbitrator.  
21 And suppose GM stiffes you on those three-quarters where you  
22 prevailed -- your client prevailed. I would have thought --  
23 and maybe Mr. Steinberg should be heard on this because if he  
24 contends to the contrary, I guess I should know it. But I  
25 would have thought that you could come back to me and say make

1 GM -- New GM comply with the arbitrator's award. But you're  
2 not trying to enforce the arbitrator's award. You're trying to  
3 attack it. You're trying to attack the one-quarter of it you  
4 don't like.

5 MR. SNYDER: Your Honor, we're trying to say that if  
6 there is judicial review of a statute that does not allow for  
7 judicial review that the constitutionality of the statute, the  
8 due process argument is the district court possesses  
9 jurisdiction to that. There's a crucial difference, Your Honor  
10 -- and to me, this is the crux of our argument. Putting the  
11 core related and Petrie aside for the moment, whether this  
12 Court has jurisdiction or not is to me not the issue. The  
13 issue is whether the California court has jurisdiction. What  
14 GM is saying is this Court has sole and exclusive jurisdiction.  
15 That means of the 600 dealers that had their claims arbitrated  
16 with GM, if they are unhappy with a portion of the award then  
17 all 600 nondebtors with New GM, a nondebtor, that this Court  
18 has sole and exclusive jurisdiction to determine under the  
19 Federal Arbitration Act what a covered dealership is. And I'm  
20 suggesting that the California district court, whether as a  
21 federal question or for constitutionality purposes, might also  
22 have that jurisdiction because it can't be that as a result of  
23 the wind-down agreements, when the Dealer Arbitration Act was  
24 passed that the Court was willing to say we're going to pass  
25 the Dealer Arbitration Act to give you dealers another bite at

1 the apple. But you have to go back to the bankruptcy court if  
2 you want it enforced. Now maybe this Court does have related-  
3 to jurisdiction but it couldn't be, Your Honor, that there is  
4 no right of judicial review and Congress' intent was that  
5 everybody has to come back here. And that's --

6 THE COURT: I don't want to interpret you, Mr.  
7 Snyder, but it wasn't related-to jurisdiction that I think is  
8 in play here. I think it's arising-in jurisdiction, the second  
9 of the three prongs under 1334.

10 MR. SNYDER: Understood, Your Honor. And again, even  
11 if this Court has arising-to jurisdiction, that is not what  
12 we're arguing. They are arguing -- and remember, Your Honor,  
13 the motion seeks to compel us to withdraw a lawsuit in federal  
14 court because the district court does not have jurisdiction.  
15 And I think for the three reasons I've stated, the plain  
16 language of 48(c), the introduction of a federal question and  
17 the constitutionality of a law that does not allow for judicial  
18 review, gives the California district court jurisdiction. It's  
19 not to say that this Court doesn't have jurisdiction but we  
20 didn't start in this court. We started in the federal court in  
21 California. They filed an answer. They didn't move to  
22 dismiss. And then three days later, they filed the motion  
23 here. Not by order to show cause because they were so  
24 concerned about the California's court jurisdiction but by  
25 regular motion. The -- we, in deference to this Court, didn't

1 go into the California court to seek a stay. We told them that  
2 we would come here and explain to this Court why the Court, the  
3 California court, has federal court jurisdiction. They don't  
4 reply to our arguments about Vaden and the ability of a federal  
5 court to go through -- look through an arbitration. The  
6 decision is powerful, Your Honor, to the extent it allows you  
7 to look through the arbitration and see if a federal question  
8 is presented. That's our issue, that federal questions are  
9 presented, constitutionality presented. Normally not an issue  
10 but in a case where a statute is silent as to the right of  
11 judicial review, the implication or the logical extension of  
12 their argument is that everybody has to come back here. And it  
13 is submitted, Your Honor, that that's not what Congress  
14 intended by leaving the statute silent. We believe what they  
15 intended is that the arbitration rules will allow the dealer,  
16 the aggrieved dealer, to go into a court of competent  
17 jurisdiction to get the relief they seek.

18 And although the judicial estoppel argument has gone  
19 up and back, Your Honor, in their complaint, in paragraph 3 in  
20 the Santa Monica case, they don't just rely on diversity when  
21 they seek to compel Santa Monica to execute the settlement  
22 agreement. They rely on 28 U.S.C. 1331 to get the district  
23 court's attention. They rely on the Dealer Arbitration Act to  
24 get the Court to execute -- to restrain Santa Monica. Then  
25 they come here and say this Court has sole and exclusive

1 jurisdiction with respect to matters in the Dealer Arbitration  
2 Act. They didn't come here, Your Honor, when Santa Monica  
3 sought to exercise jurisdiction and refused to sign that  
4 settlement agreement. They went to the California district  
5 court. And so, to argue that sole and exclusive jurisdiction  
6 sits here but to rely on federal jurisdiction not just  
7 diversity, 28 U.S.C. 1331 jurisdiction in California, to me,  
8 rises to the level of judicial estop.

9 The last argument, Your Honor, which was the first  
10 one you raised, is the applicability of Petrie and the ability  
11 of the Court to enforce its orders. And there's no doubt that  
12 buyers have expectations and they want this Court to enforce  
13 them and they have a right to come in here and seek that. But  
14 they have -- every provision of the wind-down agreement that  
15 they have pointed to, other than the covenant to sue, is not  
16 being implicated. We were able to sue, commence an  
17 arbitration, because the Dealer Arbitration Act allowed us to.  
18 They actually state in their papers that us going into  
19 California district court violated the covenant to sue. Well,  
20 how can that be? How can that be that the statute allows us to  
21 go to Califor -- and commence an arbitration but doesn't allow  
22 it to enforce it anywhere?

23 The wind-down agreement is still the wind-down  
24 agreement. The dealer, Rally, and the other 600 dealers still  
25 have certain obligations that they need to fulfill by October

1 31st. But the covenant not to sue is not one of them because  
2 the statute that was codified in December 2009 gave the dealer  
3 certain rights. And they are limited rights. They're not  
4 happy with the outcome. Rally believes that the definition of  
5 covered dealer was inappropriately misinterpreted by the  
6 arbitrator. There is nothing in the wind-down agreement or the  
7 363 order, Your Honor, that suggests they would have to come  
8 back here for that.

9 Now, it's unfortunate that the statute is silent.  
10 But issues of due process and federal question as well as the  
11 AAA rules allow Rally to go into court in California to redress  
12 those arguments. That's our position. Again, we're not  
13 suggesting or it's minimally relevant that this Court has  
14 jurisdiction. Our question is does the California court have  
15 jurisdiction. GM thought it did under 28 U.S.C. 1331. So do  
16 we. And that's the reason we object to them saying this Court  
17 has sole and exclusive jurisdiction under the wind-down  
18 agreements as if the Dealer Arbitration Act didn't exist.

19 THE COURT: Well, you hit on something that I'm glad  
20 you did, Mr. Snyder, because I want both you and Mr. Steinberg  
21 to address it when it's your respective turns. And, of course,  
22 it's your turn now. I would have thought that the Dealer  
23 Arbitration Act trumps my order and the wind-down agreements to  
24 the extent they're inconsistent. But that the duty of any  
25 Court is to try to construe them together to achieve harmony

1 between them so there is the minimal clashing between the two  
2 and that where, of course, the later Dealer Arbitration Act  
3 speaks to something, it controls over my order but only to that  
4 extent. Do you think I'm off base from that?

5 MR. SNYDER: I do not, Your Honor.

6 THE COURT: All right. Keep going.

7 MR. SNYDER: And, Your Honor, I or Rally do not see  
8 the ability to confirm a judgment, as that term is defined in  
9 48(c), or if the district court should allow, modify or vacate  
10 the judgment under the commercial arbitration rules as being  
11 anything other than an extension of the arbitration which was  
12 codified in the Dealer Arbitration Act. It isn't a violation  
13 of the covenant not to sue under the wind-down agreements  
14 because under the wind-down agreements in July 2009, this was  
15 not a sparkle in anybody's eye. No one knew what Congress  
16 would end up doing six months later. They're looking to  
17 prohibit us from doing something that wasn't even contemplated  
18 at the time Your Honor entered that order. This came six  
19 months later. And so the rules changed partially. I'm not  
20 suggesting the wind-down agreements are -- they say aggregated  
21 -- none of that. But the covenant to sue was. And they were  
22 allowed to commence arbitrations against New GM in order to get  
23 rights back, thumbs up or thumbs down.

24 THE COURT: Do you think it covers all covenants or  
25 all suits or can you harmonize them by saying that if you win



1 in the arbitrations that Congress has now given you, of course  
2 you have the right to enforce that if your opponent, which in  
3 this case is New GM, is so dumb as to try to welsh on the  
4 arbitrator's ruling. But that's really how they -- separate  
5 provisions are best read together.

6 MR. SNYDER: Your Honor, there's a reason why -- you  
7 call it dumb, but there's a reason why the fifty states and  
8 every federal statute except this one that I've seen has the  
9 right of judicial review. It's because if there is no  
10 enforcement of a final or binding arbitration then the other  
11 side could say, ha, forget it, I'm not doing anything 'cause  
12 you have no place to go.

13 THE COURT: Again, I remain troubled by the  
14 distinction between enforcing the award which my tentative,  
15 California style subject to your opponent's right to be heard,  
16 is that if New GM hadn't complied with the arbitrator's award,  
17 I would make it, and to attack the arbitrator's award which  
18 invokes separate policy considerations.

19 MR. SNYDER: Well, Your Honor, I would say that it  
20 seems as if the rules which required findings of fact were set  
21 up for judicial review. If the arbitrator had simply said,  
22 Your Honor, we're ruling against Rally because I know Larry  
23 Mayle, the president, and I don't like him, where could we go?  
24 If the Court is suggesting if that was the ruling that we could  
25 go into this court to overturn or vacate an arbitration for

1 manifest disregard of fact and law out of an arbitration coming  
2 out of the Dealer Arbitration Act, I don't see it. I see it as  
3 being a federal question that allows judicial review for  
4 manifest disregard of facts and law through a federal court.  
5 That's what the Supreme Court said in Vaden, that you can look  
6 through the arbitration to see if a federal question exists.  
7 GM doesn't even cite to Vaden in their reply brief. But that  
8 is uniquely a federal question. Is Chevy a covered brand as  
9 that term is defined under 747(a) and (d)? What could be more  
10 of a federal question than citing to the statute itself. This  
11 is not an abstract referral, Your Honor, where Rally was trying  
12 to get around state jurisdiction. This is questioning the  
13 words of a federal statute. And Rally would have never thought  
14 to come to this court, Your Honor, as a result of an  
15 arbitration to enforce or to ask this Court to make findings of  
16 fact as to whether Chevy is a covered dealership as that term  
17 is defined under 747(a) because although this Court might have  
18 jurisdiction, the California court certainly has jurisdiction.

19 And, Your Honor, that's what we see as the  
20 difference. When I speak about losing or diminishing  
21 jurisdiction in the sales process, I'm not suggesting that  
22 buyers can't come back to get the benefit of their bargain.  
23 But this was not the benefit of anybody's bargain because the  
24 Dealer Arbitration Act wasn't even in existence at the time.  
25 They couldn't have said we want this statute because we want no

1 judicial review from the dealers. What are you talking about?  
2 There's no right to review anyway. There's a covenant to not  
3 to sue. The Dealer Arbitration Act hadn't even been introduced  
4 yet. So they can't say they didn't get their expectation  
5 'cause there was no expectation. This was six months later.  
6 So I don't see this as an enforcement of an order 'cause there  
7 was no expectation that they would have that right.

8 (Pause)

9 THE COURT: Okay. Mr. Snyder, I'm going to give you  
10 a chance to reply but is this a good time to hear from Mr.  
11 Steinberg?

12 MR. SNYDER: Yes, Your Honor. Thank you.

13 THE COURT: Thank you.

14 (Pause)

15 MR. STEINBERG: Good afternoon, Your Honor. I think  
16 Your Honor's questions were very incisive and I will try to  
17 answer them as best as I can and to try to point out why I  
18 think my colleague has not fully answered Your Honor's inquiry.  
19 I think Your Honor is correct that the real issue here is there  
20 was a wind-down agreement. Your Honor approved the wind-down  
21 agreement that was part of the sale process. And then  
22 subsequently, Congress acted under the Dealer Arbitration Act.  
23 So how do you mesh what you had done versus the later  
24 congressional statute?

25 And I think it's important to distinguish what does

1 the Dealer Arbitration Act do and what it specifically did not  
2 do. And the thing that it did, and I think my colleague has  
3 agreed with this, is it provided dealers who either signed the  
4 wind-down agreements or had their dealership agreements  
5 rejected in either the Chrysler or General Motors cases a new  
6 right created by a federal statute to be reinstated to the  
7 dealer network of the debtor or the purchaser of the debtor's  
8 assets. And in order to avail themselves of that right, they  
9 had to file timely notices in accordance with the Dealer  
10 Arbitration Act for binding arbitration. And I think my  
11 colleague was correct. It was either up or down. Either  
12 you're reinstated or you're not reinstated. And the Dealer  
13 Arbitration Act told arbitrators they had seven factors,  
14 nonexclusive, to take a look at for purposes of making that  
15 determination. And there was specific and very, very tight  
16 deadlines that were put in for the arbitration. You had to act  
17 to ask for arbitration within forty days. You had six months  
18 to complete the arbitration. The arbitrator had seven days to  
19 make its ruling and that everything had to be done by July 14th  
20 because the legislative intent of the statute which was to try  
21 to create what Congress thought was a better balance between  
22 the rights of dealers and the rights of the manufacturers, the  
23 legislative intent was we need to have a streamlined process  
24 that would not otherwise get bogged down with discovery or  
25 litigation. We both quote -- at least our reply quotes from

1 the legislative history to the statute which is fairly sparse.  
2 But the legislative history refers to the need to have  
3 something streamlined and quick and the statute does not  
4 provide for judicial review unlike the Federal Arbitration Act  
5 in Section 9, 10, 11 and 12. There are specific provisions  
6 which talk about what a Court can do or not do in connection  
7 with something that is governed by the FAA. This clearly is  
8 not governed by the FAA. The FAA governs agreements where the  
9 parties had agreed to arbitrate. This was not one of those  
10 situations. This was a case where Congress had imposed the  
11 obligation or the right for the dealer to seek arbitration  
12 under specific circumstances but it wasn't a contractual  
13 obligation that the parties had bargained for. So the FAA,  
14 which is leadered (sic), the cases relating to the FAA, the  
15 judicial review relating to an FAA, which my adversary recites  
16 in his papers, they really have no relevance here. And I think  
17 Your Honor was right. There is no judicial review. And that  
18 was, I think, intentional. And I think my adversary says where  
19 is it that you can never get judicial review? You know,  
20 Congress passes a statute not -- imposing a new right and then  
21 says that's -- we'll have a procedure to implement that statute  
22 and that's it. And there's no more judicial review.

23 THE COURT: Well, pause, Mr. Steinberg, because I'm  
24 wondering if that proves too much. Suppose the arbitrator's  
25 taking bribes. And suppose the forum is this court and the

1 dealer's been victimized by the arbitrator taking bribes.

2 You're telling me that I can't look at that?

3 MR. STEINBERG: I'm not sure if the right remedy  
4 would have been to go to the AAA and say that there was an  
5 invalid arbitration and seek the remedy there to invalidate the  
6 results of the arbitration. But --

7 THE COURT: So you're going to take that and -- bring  
8 it down and give it to the marshals and then you can return to  
9 the courtroom.

10 MR. STEINBERG: But I will say, Your Honor, that the  
11 hypothetical that you posed which is that if there was a  
12 violation of what Congress had enacted because they had bribed  
13 the arbiter of the resolution, it would seem to me that there  
14 needs to be some kind of review. And maybe it would be Your  
15 Honor who has the review. I'm not sure whether it would be the  
16 AAA that would review it. But it would seem to me in a bribe  
17 circumstance that that would be the case.

18 But I think critical for what my adversary has argued  
19 which is that he's raised the potential for the  
20 constitutionality of the Dealer Arbitration Act because there  
21 is no judicial review, I don't know where that argument goes  
22 for him because the Dealer Arbitration Act was a right given to  
23 the dealers to potentially seek reinstatement. If you declare  
24 the statute unconstitutional then they don't have that right.  
25 If he's asking you to put in to the statute that which doesn't

1 exist which is to, in effect, write the judicial review section  
2 when Congress didn't write it, I don't think Your Honor has the  
3 ability to do that.

4 And I don't think -- you know, they spend ten pages  
5 of their brief saying how we didn't comply with provisions that  
6 is the judicial standard under the Federal Arbitration Act.  
7 And I would say to Your Honor that that's irrelevant because  
8 that's not -- there is no standard of judicial review. And you  
9 can't pick something from another statute and say that's what  
10 I'm going to use here in order to make it constitutional.

11 Now, there is situations where Congress has given a  
12 right to a party and there is no judicial review. We cited in  
13 our papers the Switchmen case which was actually quoted in  
14 Thomas. And we specifically highlighted the language which  
15 said that "A review by the federal district court of the  
16 board's determination is not necessary to preserve or protect  
17 that right." Congress, for its reasons on its own, decided  
18 upon the protection of the right which it created. And if you  
19 look at Thomas itself, they talked about the concept of where  
20 Congress has written legislation where it asked an agency to  
21 make a decision. And the issue was if the agency did something  
22 wrong, can it get judicial review. And there are certain  
23 statutes that provide that there is no judicial review. So the  
24 Thomas case when it was written referred to Medicare  
25 reimbursement and said that an agency's review relating to

1 Medicare reimbursement is not subject to judicial review.

2 So --

3 THE COURT: And Switchmen dealt with the Railway  
4 Labor Act?

5 MR. STEINBERG: Yes.

6 THE COURT: And it was at least Thomas that was the  
7 use of your "passum" if I recall.

8 MR. STEINBERG: Yes. And I apologize for that, Your  
9 Honor.

10 So we have a situation here where there was a  
11 legislative reason why things were done on a streamlined basis.  
12 There is no language that talks about judicial review and there  
13 is no issue I believe relating to constitutionality. But if it  
14 is, I don't think it gets them anywhere. And it was nice that  
15 they made this a central part of their oral argument when it  
16 was relegated to a footnote in their brief which -- without any  
17 real challenge other than just a throw-away that they question  
18 whether it could be constitutional if there's no judicial  
19 review.

20 Your Honor --

21 THE COURT: At least it got your attention enough for  
22 you to cover it from pages 8 through 10 of your reply.

23 MR. STEINBERG: Yes, Your Honor, because I did think  
24 it was an important issue and that Your Honor would want the  
25 benefit of some briefing. But I did not think that that was



1 the center of the argument.

2 Similarly, you'll notice how their argument is  
3 morphed because their papers said Your Honor didn't have  
4 jurisdiction, didn't have core jurisdiction, didn't have  
5 related jurisdiction, asked you to defer to the public policy  
6 of the Federal Arbitration Act, to defer to an arbitration when  
7 they weren't prepared to necessarily defer to arbitration. And  
8 now they, today, said well, we really didn't say you didn't say  
9 you didn't have jurisdiction. You just don't have exclusive  
10 jurisdiction. We think it may be concurrent jurisdiction. So  
11 they did move as well on that.

12 But I think, Your Honor, that the reason why you do  
13 have exclusive jurisdiction and the reason why the wind-down  
14 agreement is implicating is because there is no judicial review  
15 of what the arbitrator did. If there is no judicial review --  
16 I think everybody agrees that the statute doesn't provide for  
17 it explicitly. If there isn't then what's left? Because the  
18 other thing that was critical as to the interplay between the  
19 Dealer Arbitration Act and the wind-down agreement, the other  
20 thing that's critical is that the Dealer Arbitration Act didn't  
21 abrogate totally the wind-down agreement. I think my  
22 colleague, my adversary, has agreed that it didn't totally  
23 abrogate it. There are specific provisions that survive. And  
24 so, that if you have an arbitration which has been completed  
25 because all the arbitrations had to be completed by July 14th,

1 and that's it then what's left on the areas where there was no  
2 reinstatement, the thumbs down for the Chevrolet dealership,  
3 you're back to being governed by the wind-down agreement. The  
4 wind-down agreement provided that you couldn't sue New General  
5 Motors. That still applies. There (sic) was abrogated solely  
6 to the extent that the Dealer Arbitration Act allowed for this  
7 binding arbitration remedy to be afforded to dealers who  
8 availed themselves of the opportunity to seek arbitration  
9 within forty days of the enactment of the Act. Otherwise, the  
10 wind-down agreement stayed in effect. And the wind-down  
11 agreement stayed in effect now for purposes for this entire  
12 period of time that the Rally dealership was not entitled to  
13 buy New General Motors vehicles because the wind-down provision  
14 for that still stayed in effect.

15 THE COURT: Mr. Steinberg, do you agree that if New  
16 GM hadn't complied with the arbitrator's award on the three  
17 brands for which the arbitrator ruled in Rally's favor that  
18 Rally could have come back here to enforce it with or without  
19 the no-sue clause?

20 MR. STEINBERG: Yes.

21 THE COURT: All right.

22 MR. STEINBERG: Yes. I agree with that because  
23 there, the provision, I believe, is ancillary to the  
24 arbitration decision. They're looking to implement and enforce  
25 the arbitration decision. And I think that if it wasn't being

1 done since the arbitration is over, they do need to have some  
2 kind of remedy. And they should be able to come back to this  
3 Court. But I do think it's this Court because I do think that  
4 part and parcel of the reason why there was exclusive  
5 jurisdiction language in the sale order, exclusive jurisdiction  
6 in the wind-down agreement that everybody who signed the wind-  
7 down agreement signed was that New General Motors had bargained  
8 for as part of the sale process -- had bargained for one forum,  
9 this Court who had approved the transaction, to handle anything  
10 relating to an enforcement or dispute relating to these  
11 agreements. And to take it more broadly, to handle anything  
12 that related to, in effect, the assignment and the continuation  
13 of the dealership network from Old GM to New GM. And I think  
14 that that was what New GM had bargained for here. And I think  
15 Rally understood that because they not only were passive on the  
16 entry of the sale order but in the wind-down agreement they  
17 specifically recognized the exclusive jurisdiction. And that  
18 didn't change. That didn't change. That's what New GM had  
19 bargained for.

20 The issue, Your Honor, with regard to judicial  
21 estoppel I think could be easily dealt with by the fact that in  
22 the case where New General Motors went to a court, it was to  
23 enforce a settlement agreement. The Dealer Arbitration Act  
24 specifically says that if you're going to settle then there is  
25 no arbitration and that the arbitrator has nothing to do. So

1 when parties settle, they take themselves out of the Dealer  
2 Arbitration Act totally based on the expressed language of the  
3 statute. Then if someone --

4 THE COURT: Why didn't New GM come to me to enforce  
5 that order?

6 MR. STEINBERG: We could have, for sure, Your Honor.

7 THE COURT: I'm sorry?

8 MR. STEINBERG: We could have, for sure, done that.

9 Your Honor, the issue with regard to Rule 48(c) of  
10 the Commercial Arbitration Rules, we did indicate that we  
11 weren't fully adopting the Commercial Arbitration Rules. The  
12 Commercial Arbitration Rule, Rule 48(c), is for purposes of  
13 seeking enforcement of an arbitration award and they are not  
14 seeking enforcement of an arbitration award. And the AAA rules  
15 itself say that the rules will be applied only to the extent  
16 that it's not inconsistent with the Dealer Arbitration Act.  
17 And we believe to try to, in effect, implicitly put in a  
18 judicial review concept through a rule that says that you can  
19 move for enforcement where we had protested it is inconsistent  
20 with the Dealer Arbitration Act which didn't provide for  
21 judicial review.

22 Now, the fact that -- I think my adversary pointed  
23 out to the fact that October 31 is fast approaching. And under  
24 the wind-down agreement, the Chevrolet dealership will be  
25 terminated. And the new dealership that New GM had promised to

1 -- an entity that used to be a Saturn dealership that operated  
2 in the area is going to be given. And there are rights that  
3 people have because of that unless something happens in this  
4 court or another court. But there is this ticking deadline  
5 that is there. And they never -- they filed a motion -- a  
6 complaint in August. They themselves have never moved for an  
7 injunction or for a stay or to try to continue the October 31  
8 deadline. And I don't think that they can. I think that they  
9 had agreed that it would get terminated. I think even the  
10 Dealer Arbitration Act specifically wanted finality to these  
11 issues and to have finality because it's not only New GM's  
12 rights that are being implicated but we've had a dealer who's  
13 effectively been on hold since December of 2009 waiting to go  
14 in on November 1st. And their rights will be implicated as  
15 well.

16 I think that, Your Honor, that with regard to the  
17 interplay between the wind-down agreement and the Dealer  
18 Arbitration Act -- the two most critical things is that there  
19 is no judicial review that's specified in the statute. And  
20 because there's no judicial review, you're left with a wind-  
21 down agreement that had not been, in effect, modified at all  
22 except for the overlay of allowing for binding arbitration on a  
23 right given by Congress. And therefore, the commencement of  
24 the lawsuit after the award had been given by the arbitrator is  
25 a violation of the wind-down agreement and the provisions that

1 say that you should not sue and you should not interfere.

2 I will note, because it hasn't been said, that the  
3 arbitrator gave his award in June and New General Motors gave a  
4 letter of intent for the other four dealerships that the  
5 arbitrator said had to be reinstated. And Rally has been  
6 reinstated for those other four dealerships. And this --

7 THE COURT: Oh. So when I said it won three-  
8 quarters, actually it won four-fifths? Or with respect to four  
9 of the five franchises that it once owned?

10 MR. STEINBERG: That's correct. So they are  
11 operating right now. And they got their letter of intent which  
12 was supposed to be given by New General Motors, I think, with  
13 ten days of the arbitration award. It was only after that they  
14 were well down the road to getting the four in place that they  
15 decided to sue for the fifth. And, Your Honor, our brief tries  
16 to strip away the layers. And to some extent when you orally  
17 argue, you try to figure out how much of all the arguments you  
18 have to make. But this was even governed by the Federal  
19 Arbitration Act. I'm not even sure whether -- what they're  
20 arguing about would be subject to any kind of judicial review  
21 anyway. We do set forth in our brief the arguments that we  
22 think show that there was -- that the arbitration award was  
23 consistent with what should have been done because there was  
24 not one franchise agreement but there were five franchises  
25 agreement. And it's been dealt with because they've taken four

1 of the five and we still have one that's outstanding. And we  
2 point to the language of the sales agreement which talk about  
3 "General Motors separately on behalf of its division  
4 identified" and talk about the "separate" nature of each of  
5 these agreements. The wind-down agreements uses the plural,  
6 doesn't use the singular for purposes of talking about these  
7 agreements. And not to be overly cute about the argument, but  
8 if they were right that this was one agreement and not five  
9 agreements and the arbitrator found a taint with regard to one  
10 portion of an integrated agreement then the result would be the  
11 same as if it was an executory contract under the Bankruptcy  
12 Code with five lease schedules as part of one integrated  
13 agreement where the debtor couldn't perform all five. It's an  
14 all-up or nothing. And if that's the case, there would not  
15 have been a reinstatement for all five instead of one. That's  
16 the natural outflow of what their argument is which is that if  
17 you've got a taint on an integrated agreement which is  
18 nonsoluble then the whole agreement falls not that the whole  
19 agreement becomes good. And so, what you have here is someone  
20 who got the benefits of four dealerships. Then after they got  
21 the four dealerships on the reinstatement decided to sue and is  
22 now making an argument which is I want my cake, I want to eat  
23 it, too, in the context of a statute that doesn't provide for  
24 this type of relief.

25 Your Honor, if you'd just bear with me just one

1 second, I just want to check my notes to see if I --

2 THE COURT: Sure.

3 MR. STEINBERG: -- have answered your questions.

4 (Pause)

5 MR. STEINBERG: I think, Your Honor, when you said --  
6 you asked my adversary the question did the Dealer Arbitration  
7 Act trump the wind-down agreement for all purposes and he  
8 answered no that it was incumbent on you to try to make the two  
9 consistent and coherent that he was essentially making the  
10 argument that I'm asking Your Honor to, as well, which is that  
11 the wind-down agreement had vitality and it was modified for  
12 purposes of the covenant not to sue solely for the purposes of  
13 doing the binding arbitration procedure consistent with the  
14 statute that Congress had subsequently passed. Thank you.

15 THE COURT: Okay. Thank you. Mr. Snyder, reply?

16 MR. SNYDER: Your Honor, to first argue what is a  
17 covered dealership, what is a not covered dealership to use  
18 executory contract analyses versus using franchise law  
19 analyses, using California law versus Title 11 law, that's  
20 another reason why the California court has jurisdiction  
21 because, again, what Mr. Steinberg is doing is saying well,  
22 look, Judge, you have jurisdiction. You can apply bankruptcy  
23 law between two nondebtor parties as to what means a covered  
24 dealership under the Federal Arbitration Act. And any of the  
25 600 dealers who applied for arbitration under GM could do that



1 as well. And it seems to me that if Congress meant to give  
2 dealers and the AAA jurisdiction over these acts then by a  
3 natural extension, he meant them to be final and binding.  
4 Counsel for New GM sort of takes the car and then he hits a  
5 brake. He says the covenant not to sue was abrogated by the  
6 Dealer Arbitration Act but it stops there, that there is no  
7 right after the arbitration. And that is not true and also  
8 doesn't address the question of federal question jurisdiction  
9 that the federal court can possess jurisdiction over.

10 And he raised the Thomas case, Your Honor, but the  
11 statute involved in the Thomas case is the Federal Insecticide  
12 Fungicide and Rodenticide Act. In that statute, Your Honor,  
13 and I cite to Section 136a(c)(1)(F)(iii) of Title 7: "The  
14 FIFRA arbitration scheme allows judicial review of 'the  
15 findings and determinations of the arbitrator' only in the  
16 instance of fraud, misrepresentation or other misconduct by one  
17 of the parties to the arbitration or the arbitrator. This  
18 provision protects against arbitrators who abuse or exceed the  
19 powers or willfully misconstrue their mandate under the  
20 governing law." So Title 7 allowed for judicial review or  
21 allowed for a response to Your Honor's question as to what  
22 happens when an arbitrator acts inappropriately. Those last  
23 quotes, by the way, Your Honor, were the Thompson v. Union  
24 Carbide, 473 U.S. at 592.

25 Here there's nothing. There's no ability for Rally

1 or any of the 600 dealers to get redress as a direct result of  
2 the arbitrator's conduct no matter what it is. And so what  
3 they're saying is everybody, come back here. And we just don't  
4 believe that's appropriate under the case law. It's not  
5 appropriate under Union Carbide. It's not appropriate under  
6 Vaden. And it's not appropriate, we would suggest, under the  
7 Second Circuit law.

8 Your Honor, the statute is less than a year old. Of  
9 course, the cases we need to use are cases by analogy which are  
10 the FAA statutes. So under the FAA -- I'm sorry -- line of  
11 cases, there are agreements. Agreed. But that doesn't mean  
12 the arguments aren't consistent because the AAA rules assume  
13 that if you're a party to the arbitration you've agreed to  
14 consent to the outcome. In the Second Circuit case, in the  
15 Idea Nuova case, the statute is silent just like the statute --  
16 I'm sorry -- the agreement is silent just like the statute here  
17 is silent. AAA rules apply and we're not saying anything else.  
18 And the Second Circuit said if the AAA rules apply then  
19 whatever the arbitrator says is final and binding and the  
20 unhappy party can then go to the district court and try to  
21 confirm that arbitration. Makes sense. That's all we're  
22 seeking to do here. The statute is silent. To suggest that we  
23 have no right of judicial review of an arbitration belies the  
24 fact that every stage plus Title 9 allow for confirmation,  
25 vacature, review of arbitrations.

1 Now, Mr. Steinberg is right. The statute 48(c) only  
2 speaks to judgment. And maybe the California district court'll  
3 say you can only seek to confirm the judgment. You can't seek  
4 to vacate it. You can't seek to modify it. And interprets  
5 Rule 48(c) that way as counsel did. But why can't Rally have  
6 the chance to allow California law to do that?

7 Your Honor, this is important. I'd like to go  
8 through the wind-down agreement and the jurisdiction sections  
9 because they are not inconsistent with the relief we're seeking  
10 here. This is from GM's own motion. "The Court retains  
11 exclusive jurisdiction to enforce and implement the terms of  
12 this order, the MSPA," which is the wind-down agreements, "and  
13 each of the agreements executed in connection therewith,  
14 including the deferred termination agreement in all respects  
15 including, but not limited to, retaining jurisdiction to  
16 resolve any disputes with respect to or concerning the deferred  
17 termination agreements."

18 There's no dispute regarding the deferred termination  
19 agreements at all. There's a dispute as to whether Chevy is a  
20 covered dealership under the Dealer Arbitration Act. We take  
21 no position as to whether this Court -- the sale order speaks  
22 for itself. Section 13 of the wind-down agreement.  
23 "Continuing jurisdiction. By executing this agreement, Dealer  
24 hereby consents and agrees that the bankruptcy court shall  
25 retain full complete and exclusive jurisdiction to interpret,

1 enforce and adjudicate disputes concerning the terms of this  
2 agreement and any matters related therein and survives  
3 termination."

4 Absolutely. There's an October 31st deadline. The  
5 wind-down agreement sets that out. We're bound to the extent  
6 we're bound under the wind-down agreement. We've asked GM to  
7 extend the October 31st date because of the late hour. They've  
8 refused. So now we have to deal with the October 31st deadline  
9 or get an extension by a court of competent jurisdiction.

10 But we're not addressing any of those provisions.  
11 Our -- we are seeking jurisdiction based on the Dealer  
12 Arbitration Act and not on the sale order and not on the wind-  
13 down agreements. This Court still has jurisdiction over those.

14 Your Honor, the argument about timing -- no good deed  
15 goes unpunished. They answered on September 7th and came into  
16 this court on September 10th. And then when we tried to get a  
17 hearing date as quickly as possible, we agreed we wouldn't go  
18 to the court in California to seek a stay if we could get a  
19 hearing date on October 4th. And we've abided by our agreement  
20 and we're anxiously awaiting whatever the Court's determination  
21 is going to be. But we deferred to this Court first because  
22 that's where New GM went. And nobody delayed here. As soon as  
23 the motion was filed, we sought a quick hearing and we got one  
24 thanks to chambers and Your Honor's courtesy. But -- I believe  
25 I'm finished.

1 THE COURT: All right. Very well. All right. We're  
2 going to take a recess. I don't know how long it's going to  
3 take me. But you needn't be here before 4:30. And I'll come  
4 out with a ruling as soon thereafter as I can. We're in  
5 recess.

6 (Recess from 4:04 p.m. until 5:30 p.m.)

7 THE COURT: Have seats, please. I apologize for  
8 keeping you all waiting. In these jointly administered cases  
9 under Chapter 11 of the Code, General Motors LLC, which I'll  
10 normally refer to as New GM, moves for an order enjoining Rally  
11 Dealership from interfering with New GM's ability to, as it was  
12 put, to reform its dealership platform pursuant to a previous  
13 order I entered, from vacating or modifying an arbitration  
14 decision and from pursuing that effort in California district  
15 court.

16 Rally was a GM dealership that was being closed  
17 pursuant to an agreement that was acquired by New GM from Old  
18 GM. The Dealer Arbitration Act, which was subsequently signed  
19 into law, provided an opportunity for dealers such as Rally to  
20 become reinstated as New GM dealers, if they were successful in  
21 a binding arbitration proceeding, with New GM.

22 Rally won its arbitration proceeding with respect to  
23 three of its brands but not its Chevrolet brand. Rally is  
24 attempting to have this arbitration award modified or vacated  
25 in a federal district court in California. New GM argues that

1 there is no right to modify the arbitration award and,  
2 additionally, that my Court is the only forum that can hear  
3 this issue. In addition, New GM argues that Rally has been  
4 interfering with New GM's establishment of an alternate Chevy  
5 dealership in violation of its agreement with New GM.

6 While I understand the difficulties faced by dealers  
7 such as Rally as a consequence of the events of last year, the  
8 motion must be granted. The following are my findings of fact  
9 and conclusions of law in connection with this determination.

10 As facts, I find that on July 5th, 2009, I entered  
11 the 363 sale order. That sale order authorized and approved a  
12 master purchase agreement dated as June 26, 2009, often  
13 referred by the parties as the MPA, between Old GM and an  
14 entity that later became New GM. Pursuant to the MPA and the  
15 363 sale order, on July 10, 2009, New GM purchased  
16 substantially all of Old GM's assets free and clear of Old GM's  
17 liabilities except as expressly assumed by New GM under the  
18 MPA.

19 As part of the transactions that were approved under  
20 the 363 sale order, Old GM entered into and assigned to New GM  
21 certain deferred termination agreements, which we refer to as  
22 wind-down agreements, which had originally been entered into  
23 between Old GM and certain of its authorized dealers. These  
24 agreements had been offered to dealers as an alternative to  
25 outright rejection of their dealer sales and service

1 agreements, which we sometimes refer to as dealer agreements  
2 under the rights afforded to debtors to reject executory  
3 contracts under 365 of the Code. The wind-down agreements  
4 provided, among other things, that in exchange for certain  
5 payments and other consideration, the affected dealers' dealer  
6 agreements would terminate no later than October 31, 2010.

7 In December 2009, Congress enacted into law a new  
8 statute called the Dealer Arbitration Act which gave wind-down  
9 dealers such as Rally the opportunity to seek reinstatement to  
10 the GM dealer network through a binding arbitration process.  
11 Rally timely filed a request for arbitration and an arbitration  
12 was held in May before an arbitration -- arbitrator in  
13 California. On June 8, 2010, the arbitrator issued an award  
14 directing New GM to reinstate Rally's Buick, Cadillac and GMC  
15 dealer agreements but ruling that Rally's Chevrolet dealer  
16 agreement should not be reinstated. New GM is now currently  
17 attempting to establish another Chevrolet dealership in the  
18 Palmdale, California area where Rally is located. During this  
19 process, the owner of Rally has continued to lobby New GM to  
20 reinstate his Chevy dealership. After various proceedings, New  
21 GM determined to relocate the Chevy dealership to Lancaster,  
22 California which triggered an action by Palmdale against the  
23 city of Lancaster in the Superior Court of California.  
24 Palmdale claims that the terms of an agreement between  
25 Lancaster and the new Chevy dealership violated a state law

1 that prevent cities from engaging in bidding wars to lure auto  
2 dealers and other large sales techs generating businesses to  
3 relocate them from one city to another. The owner of Rally,  
4 one Mr. Mayle, provided an affidavit on behalf of Palmdale in  
5 that action. New GM argues that Rally, through its agent, Mr.  
6 Mayle, is providing assistance in litigation against New GM and  
7 is interfering with the establishment of a new dealership in  
8 violation of the wind-down agreement.

9 Rally argues that the arbitrator was bound by the  
10 Dealer Arbitration Act to either reject or accept the entire  
11 dealer contract and that the arbitrator exceeded his authority  
12 by not reinstating the Chevy brand as well. Thus, on August  
13 13, 2010, Rally filed suit in California district court seeking  
14 to vacate or modify the arbitration award and to prevent  
15 termination of his Chevy dealer agreement though presumably  
16 wishing to maintain intact the other aspects of the  
17 arbitrator's award which maintained his dealerships for the  
18 other three brands, Cadillac, Buick and GMC.

19 Rally alleges, in substance, that the arbitrator's  
20 award in not giving him a complete victory was erroneous as a  
21 matter of law in its failure to accept its position that all of  
22 the separate brands had to be considered together in the  
23 species of double or nothing. He has not alleged that the  
24 arbitration award was the result of bribery, fraud, corruption,  
25 manifest disregard of settled law or any other ground that



1 would be a basis for vacating an arbitration award if the  
2 Federal Arbitration Act applied.

3 I'll now turn to my conclusions of law. Turning  
4 first to jurisdiction and within the jurisdiction umbrella,  
5 first, to subject matter jurisdiction. First, it's plain that  
6 the district courts and bankruptcy courts in this district have  
7 subject matter jurisdiction over this controversy. The  
8 applicable subject matter jurisdiction statute is 28 U.S.C.,  
9 Section 1334, the section of the judicial code that follows the  
10 judicial code sections relating to federal question, diversity  
11 and admiralty jurisdiction. 1334 deals with subject matter  
12 jurisdiction with respect to bankruptcy cases and proceedings.  
13 That section provides, in relevant part, subsection (b), with  
14 exceptions not relevant here, "the district courts shall have  
15 original but not exclusive jurisdiction of all civil  
16 proceedings arising under title 11, or arising in or related to  
17 cases under title 11".

18 Rally addresses the issue of "related-to"  
19 jurisdiction under 1334 but that isn't the relevant subject  
20 matter jurisdiction issue. Rather it's the "arising in" prong  
21 of 1334 where New GM relies on an order I entered last year in  
22 this case under which this Court retained exclusive  
23 jurisdiction in paragraph 71(f) to "resolve any disputes with  
24 respect to or concerning the deferred termination agreements".  
25 The deferred termination agreements, which as I noted are also

1 referred to as the wind-down agreements, included provisions by  
2 which dealers and New GM contractually agreed that this Court  
3 retained full and exclusive jurisdiction to enforce them as  
4 well as to specifically preclude Rally and other wind-down  
5 dealers from filing suit against New GM and taking any action  
6 to interfere with New GM's establishment of additional  
7 dealerships. I'll note parenthetically that there was nothing  
8 in the Dealer Arbitration Act to modify the subject matter  
9 jurisdiction of the federal courts nor to modify any of my  
10 earlier orders other than to provide what amounted to a defense  
11 to enforcement of the deferred termination agreements if and to  
12 the extent that a dealer prevailed in the arbitration process  
13 for which Congress provided.

14 Rally did prevail in the arbitration process with  
15 respect to three of its franchises and, presumably, would like  
16 to avail itself and enforce that part of the arbitration award.  
17 But it wishes to upset the arbitration result as to which it  
18 didn't prevail and used the hoped-for alternative result, that  
19 is, a reinstatement of its Chevy franchise, as a defense to its  
20 duties under the deferred termination agreement which duties  
21 otherwise obligated it to give up its Chevy dealership, that  
22 being a classic "dispute with respect to or concerning the  
23 deferred termination agreements".

24 Now, Rally may have come to an agreement by the end  
25 of oral argument. But in any event, I so rule that this Court

1 does have subject matter jurisdiction over this controversy.

2 Similarly, I find that this is a core matter. Under  
3 28 U.S.C., Section 157(a)(2)(N), core matters include, with  
4 exceptions not relevant here, orders approving the sale of  
5 property. The 363 sale order and my approval of the wind-down  
6 agreement documented the outcome of those core proceedings.  
7 And a proceeding such as the motion now before me which seeks  
8 relief predicated on a "retained jurisdiction" clause in my  
9 order resolving a core matter is a core matter as well. The  
10 decision in Eveleth Mines, 312 B.R. at pages 644 to 645, is  
11 directly on point. In that case, the Court noted the motion  
12 that barred directly and necessarily comes out of a core  
13 proceeding in this case, the debtors' motion for authority to  
14 conduct a sale of assets of the estate free and clear of liens.  
15 Court proceedings under 28 U.S.C., Section 157(b) fall under  
16 the "arising under" or "arising in" jurisdiction of 28 U.S.C.  
17 Section 1334(b). Then the enforcement of orders resulting from  
18 core proceedings are themselves considered core proceedings.

19 The Second Circuit has held similarly. It's held  
20 that bankruptcy courts are empowered to enforce the sale orders  
21 that they enter and to protect the rights which were  
22 established by the sale order. See Millenium Seacarriers, 419  
23 F.3d at 97; and Petrie Retail, 304 F.3d at 229-230. Petrie  
24 Retail is particularly instructive because it also dealt with a  
25 dispute between two nondebtors addressing rights that were

1 created by the sale order. Though Petrie Retail was not  
2 unanimous, it's no less binding on the lower courts for that  
3 reason.

4 Now there can be no dispute what the sale order  
5 actually said. Nor can there be any dispute as to the wind-  
6 down agreement said. Section 13 of the wind-down agreement had  
7 that continuing jurisdiction clause providing that the dealer  
8 hereby consented to and agreed that the bankruptcy court would  
9 retain full complete and exclusive jurisdiction to interpret,  
10 enforce and adjudicate disputes concerning the terms of this  
11 agreement and any other matter related thereto.

12 Here and to the extent Rally was successful in the  
13 arbitration, of course that would be a defense to win any  
14 effort to make it terminate its agreement. And to the extent  
15 that it wishes to either enforce the agreement as it has the  
16 right to do with the three franchises for which it prevailed or  
17 to defeat the agreement with respect to the one agreement where  
18 it lost, in any event they concern the terms of the agreement  
19 and, in particular, any other matter related thereto. I don't  
20 think that's subject to serious dispute.

21 Finally, I've considered and ultimately rejected  
22 Rally's suggestion that I exercise discretionary abstention on  
23 that. Plainly, there is a right to invoke discretionary  
24 invention under 1334(c)(1) of the judicial code. That's 28  
25 U.S.C. Section 1334(c)(1) which provides that nothing in this

1 section prevents a district court in the interest of justice or  
2 in the interest of comity with state courts or respect for  
3 state law from abstaining or hearing a particular proceeding  
4 arising under Title 11 or arising in or related to a case until  
5 Title 11. And while it speaks principally of state courts and  
6 state law, I accept for the purposes of this analysis that we,  
7 bankruptcy courts have the power to abstain in favor of other  
8 federal courts when the circumstances so warrant. But I don't  
9 believe that the factors here so warrant. Standards that have  
10 been articulated for the exercise of discretionary abstention  
11 include of the efficient administration of the bankruptcy  
12 estate, comity, the degree of relatedness or remoteness of the  
13 proceeding to the main bankruptcy case, the existence of the  
14 right a trial and prejudice to the involuntarily removed party.  
15 Some of these, obviously, come in removal cases.

16 Here, I think the factor that is most important is  
17 the effect of the effect deficient administration of the  
18 bankruptcy estate. This was a procedure that needed to be  
19 resolved quickly as evidenced by the very tight time frames  
20 that Congress imposed. As important or more so, the bidders of  
21 the world that come in to bid for assets in the bankruptcy  
22 court must have knowledge that bankruptcy courts will stand by  
23 the documents as they were then drafted to give the parties to  
24 those agreements the predictability in their relations for  
25 which they are binding and upon which they justifiably rely.

1 The Court in Eveleth Mines explained "as applied to a sale free  
2 and clear of liens, there are also good policy reasons for  
3 making a derivative core proceeding classification. Active  
4 bidding on assets from bankruptcy estates will be promoted if  
5 prospective purchasers have the assurance that they may go back  
6 to the originally forum that authorized the sale for a  
7 construction or clarification of the terms of the sale that it  
8 approved. Relegating post-sale disputes to a different forum  
9 injects an uncertainty into the sale process which would dampen  
10 interest and hinder the maximization of value. A purchaser  
11 that relies on the terms of a bankruptcy court's order and  
12 whose title and rights are given life by that order should have  
13 a forum in the issuing court." That is very strong guidance  
14 that suggests that a Court, like me, should not abstain in  
15 favor of another jurisdiction.

16 Similarly, comity is a factor that I would take into  
17 account if there were, as contrasted to here, strong state law  
18 concerns. But here, of course, there are not. I, no less  
19 than a district court, either in New York or California, can  
20 determine that which is just in determining whether or not to  
21 enforce or, as more relevant here, to undercut an arbitration  
22 award.

23 The degree of relatedness or remoteness of the  
24 proceeding to the main bankruptcy court is subject to a double  
25 entendre. On the one hand, this is not going to affect the

1 assets and order of its liquidation in court. But the factors  
2 articulated in Eveleth Mines likewise cause Courts here to be  
3 slow to abstain because giving purchasers of assets the comfort  
4 that their needs and concerns are going to be addressed is  
5 pretty important.

6 I consider the existence of the right to a jury trial  
7 inapplicable because I assume that this would be decided  
8 without a jury trial in either events and I also consider  
9 prejudice to the involuntary removed party under the facts of  
10 this case.

11 So for all of these reasons, I decline to exercise  
12 discretionary abstention.

13 Now turning to what I should do with this controversy  
14 before me. Both sides now seem to agree that the Federal  
15 Arbitration Act doesn't apply because it implements contractual  
16 agreements to arbitrate. And here, the right to compel  
17 arbitration comes not from a contract but from the Dealer  
18 Arbitration Act itself. And it also now appears to be  
19 undisputed that the Dealer Arbitration Act doesn't provide for  
20 judicial review of arbitration awards issued after the  
21 mechanisms for which the Dealer Arbitration Act provides.

22 Nor do I think that I can or should find an applied  
23 right to judicial review under that statute. First, as you  
24 know from reading many earlier decisions that I've issued, I  
25 start with textural analysis where I note the significant

1 absence of such a provision when federal statutes routinely  
2 provide for rights to federal -- to judicial review when that  
3 is the congressional intent. If I were to imply such a  
4 provision here that would be a species of judicial legislation.  
5 Second, assuming without deciding that I could appropriately  
6 look at legislative history on a matter where the statute is  
7 not in any way ambiguous, judicially in grafting rights under  
8 that statute would be particularly inappropriate when they'd be  
9 inconsistent with the congressional desire to establish this  
10 mechanism to avoid the excessive costs and delays of litigation  
11 and to impose tight deadlines to get the arbitration process  
12 completed.

13 Nor can I accept Rally's argument that New GM  
14 conceded a right to judicial review by reason of its  
15 willingness to proceed under the AAA's commercial arbitration  
16 rules. In responding to Rally's arbitration demand, New GM  
17 expressly stated that it did not waive any objections it might  
18 have to the arbitration or to any of the AAA's commercial  
19 arbitration rules including, in particular, where such rules  
20 would be inconsistent with the provisions or purposes of the  
21 Dealer Arbitration Act. For that same reason, I can't find a  
22 waiver on the part of New GM of its rights based on a failure  
23 to protest again after its initial reservation of rights was  
24 put on the record.

25 Then even if New GM had agreed to AAA arbitration



1 rules, the arbitration rules called for a mechanism to enforce  
2 an award not to attack it. Those rules provided that parties  
3 to an arbitration under these rules shall be deemed to have  
4 consented the judgment upon the arbitration award may be  
5 entered in any federal or state court having jurisdiction  
6 thereof. See Rule 48(c) of the AAA Commercial Rules quoted at  
7 paragraph 29 of the Rally brief.

8 But that language conveys a right to enforce the  
9 arbitration award not to attack it. For example, if New GM had  
10 failed notwithstanding the arbitration award that Rally doesn't  
11 complain about to let Rally keep the three franchises the  
12 arbitrator said Rally could keep, Rally could have, at least  
13 arguably if not plainly in my view, come back to me and say  
14 make New GM do what the arbitrator said it should do. But this  
15 is the exact opposite of what we have here and one that's not  
16 authorized by the federal statute.

17 As I indicated in oral argument, and I think both  
18 sides agreed, the reasonable course for a judge in my position  
19 would be to construe the Court's earlier order and the  
20 subsequently enacted federal legislation to achieve as much  
21 harmony as possible and to honor the congressional intent to  
22 the extent that the federal legislation trumped my earlier  
23 order. But it would also be appropriate in my view to honor  
24 the congressional intent only to the extent that the federal  
25 legislation trumped my earlier order. Congress did say, of

1 course, with respect to providing for a defense to enforcement  
2 of the wind-down agreements with respect to any areas where the  
3 arbitrator ruled in the dealer's favor. And I think that if  
4 New GM had failed to honor the arbitrator's award, as I  
5 indicated a moment ago, I'd almost certainly enforce it. But  
6 that is the way by which we'd maintain harmony between my  
7 earlier order and the new Dealer Arbitration Act providing for  
8 the rights of dealers to invoke the arbitration mechanism in  
9 the fashion for which Congress provided. It doesn't provide  
10 for a blank check from me to rewrite the Dealer Arbitration  
11 Act.

12 Nor do I think that Rally can get around what is, in  
13 essence, an effort to achieve a quasi-appellate review of the  
14 arbitration award by saying that it's asking the California  
15 district court to make a federal question type determination  
16 under the Dealer Arbitration Act. That might be the case if  
17 Congress hadn't established the arbitration mechanism and if it  
18 had conferred on the district court's jurisdiction to decide  
19 issues as to what is or is not a dealership franchise. But the  
20 whole point of the statutory scheme was that New GM and dealers  
21 would proceed by arbitration. And while, if New GM had refused  
22 to arbitrate in the first place, I think that at least I would  
23 have had jurisdiction to order New GM to do so. But now that  
24 each of New GM and Rally have engaged in the arbitration  
25 process, presumably without any Court forcing either to do so,

1 we can't make the underlying arbitration award evaporate. We  
2 can only consider the circumstances, if any, under which the  
3 arbitration award is subject to judicial review. And I've  
4 already noted, of course, that the statute doesn't provide for  
5 such review.

6 Now, in that connection, I do not believe that under  
7 the allegations we have here, this construction raises  
8 constitutional issues. I assume without deciding that  
9 procedural due process requires a quasi-judicial determination,  
10 like an arbitration, to be conducted by a decider who isn't  
11 taking bribes or conspiring with one or another of the parties  
12 or, though it's more debatable, who ignored facts or binding  
13 authority on point. If there were such a contention, I'd at  
14 least have to consider whether I'd address it. And I think  
15 it's better to construe the Dealer Arbitration Act in such a  
16 fashion as to avoid any constitutional issues that would  
17 otherwise be relevant.

18 But I have no allegations of bribes, conspiracy,  
19 fraud or even manifest disregard of existing law in the matter  
20 before me. Though, if there were such allegations, I think I'd  
21 have to seriously consider whether there might be some implied  
22 right to remedy such a wrong or that in exercising my exclusive  
23 to jurisdiction to enforce or, impliedly, deny enforcement of  
24 the deferred termination agreements, I should take such facts  
25 into account. But once more, I emphasize that I have no such

1 allegations here.

2 In the absence of issues of that character, I think  
3 that Thomas and, particularly, Switchmen, the two decisions by  
4 the Supreme Court, apply to establish a rule that where an  
5 arbitrator was given the power to resolve controversies under a  
6 statute, that is, the Dealer Arbitration Act, where dealers and  
7 New GM were given rights under that statute, reviewed by the  
8 federal district courts or, of course, bankruptcy courts that  
9 are arms of the district court and have the power to issue  
10 final orders on core matters, of the arbitrator's determination  
11 is not necessary to protect those rights. I think I should  
12 restate it because I put too many parentheticals in there.  
13 Where dealers and New GM were given rights under the statute  
14 reviewed by the federal district courts of the arbitrator's  
15 determination is not necessary to protect those rights. And,  
16 of course, that's a paraphrase of Thomas, 473 U.S. at 588  
17 quoting Switchmen where I'm analytically substituting the  
18 Dealer Arbitration Act for the Railroad Labor Act and where I'm  
19 substituting arbitrator's determination for board's  
20 determination.

21 So I don't believe that judicial review is necessary  
22 except in those cases not presented here, and here only  
23 arguably, where there are allegations of fraud, corruption or  
24 manifest disregard of an existing decision. And for reasons I  
25 described above, I think the exclusive jurisdiction provisions

1 of the sale order must stick.

2 First, of course, they're res judicata so they remain  
3 binding in the absence of an appellate ruling changing them for  
4 a legislative pronouncement that does so. Second, I assume  
5 without deciding that Congress could, if it wished, to have  
6 taken my exclusive jurisdiction away just as Congress can take  
7 away jurisdiction from the lower federal courts on other  
8 matters. But Congress didn't do that. If we temporarily put  
9 aside issues as to the right to judicial review and decisions  
10 as to the merits, I assume, without deciding, that a California  
11 district court could under its diversity jurisdiction have  
12 subject matter jurisdiction over a controversy like this one.  
13 But if it did, it would be foreclosed from exercising its  
14 subject matter jurisdiction by reason of the final exclusive  
15 jurisdiction order that I entered back in July of 2009. This  
16 is no different analytically than the effect that an exclusive  
17 jurisdiction order would have over a state court proceeding.  
18 Most state courts don't need an expressed grant of subject  
19 matter jurisdiction to hear controversies before them. They  
20 normally have subject matter jurisdiction over whatever comes  
21 through their doors. But that doesn't mean that they can hear  
22 controversies when a court order or other federal law, like  
23 some federal antitrust laws or securities laws, give a federal  
24 court exclusive jurisdiction. Some federal statutes and the  
25 order that I entered into are limits on jurisdiction that might

1 otherwise exist.

2 Then Rally makes a judicial estoppel argument noting  
3 that in a proceeding against another dealer, New GM brought an  
4 action in federal court in California invoking diversity and  
5 federal question jurisdiction, the latter under the Dealer  
6 Arbitration Act, seeking to require that dealer to comply with  
7 a settlement agreement and to drop its efforts to proceed under  
8 the Dealer Arbitration Act. Frankly, I'm not impressed with  
9 the wisdom of that approach and, for the life of me, can't  
10 understand why New GM sought relief that way instead of coming  
11 to me. But I don't think its effort in that regard rises to a  
12 level of a judicial estoppel.

13 Rally depends on three statements to establish its  
14 claim of judicial estoppel. They are that the district court  
15 would have jurisdiction under 28 U.S.C. 1332; that the district  
16 court would have federal question jurisdiction under 28 U.S.C.  
17 1331 because the controversy there allegedly arose under the  
18 Dealer Arbitration Act; and that arbitrators would only be  
19 empowered to decide whether or not the specific dealership  
20 should be added back to the GM dealer network and that "all  
21 other issues that arise under the Act must be addressed by a  
22 Court of competent jurisdiction".

23 I don't think that any of these are particularly to  
24 the point. I've noted before that I assume that diversity  
25 jurisdiction provides subject matter jurisdiction to the

1 California court here. But I've also ruled that that can't  
2 trump the bankruptcy court's exclusive jurisdiction provision.  
3 And while I disagree that there and here would be federal  
4 question jurisdiction under the Dealer Arbitration Act for the  
5 particular claim there and here asserted, even if there were  
6 such federal question jurisdiction, once more, it wouldn't  
7 trump the bankruptcy court's exclusive jurisdiction provision.  
8 And I don't think there's anything particularly inconsistent  
9 between New GM's third point in that Santa Monica action and  
10 the points it's making here given the difference between the  
11 facts in each of those cases and the context in which New GM  
12 made its observations. There, an attempt to enforce a  
13 settlement agreement under which the namees (ph.) agreed to  
14 dismiss their arbitration and New GM was saying that  
15 arbitration wasn't appropriate at all rather than dealing with  
16 the consequences of a completed arbitration in which there was  
17 an arbitration award.

18 But even if there were, I'd see other problems in  
19 invoking judicial estoppel as well. As Rally notes, at page 23  
20 in its brief, citing the Second Circuit's decision in Uneeda  
21 Doll Company, "judicial estoppel prevents a party from  
22 asserting a factual position in one legal proceeding that's  
23 contrary to a position that it successfully advanced in another  
24 proceeding". Here, aside from the lack of inconsistencies, the  
25 positions that have been taken are legal not factual. And

1 there, New GM didn't ask the Santa Monica Motors court to  
2 interpret or enforce the wind-down agreement or, indeed, to  
3 interpret or enforce the Dealer Arbitration Act at all. The  
4 latter point is why I think that New GM was just wrong when it  
5 then tried to invoke the latter as a basis for 1331  
6 jurisdiction. I'm not sure what it was thinking. But under  
7 the standards of New Hampshire v. Maine, I find that the  
8 positions are not clearly inconsistent and I cannot find any  
9 perception that either the first or the second Court was misled  
10 or that New GM would derive an unfair advantage here if not  
11 estopped.

12 Finally, I think that even if judicial review were  
13 available of the arbitrator's award, I couldn't vacate the  
14 arbitrator's award here. First, even if the arbitrator was  
15 wrong, I don't see the arbitrator having been so wrong that the  
16 error would warrant bucking fundamental principles limiting the  
17 scope of review of arbitration awards. There was no case  
18 supporting Rally on this issue. Rally is, in substance, asking  
19 the Court or the Courts to, in essence, make new law on this  
20 point.

21 And assuming, though for reasons I just noted, I  
22 think this assumption is unwarranted, that I could provide ab  
23 initio review of the arbitrator's decision, I think the  
24 arbitrator got it right at least on the arbitrator's assumption  
25 that he could rule one way with respect to the Buick, GMC and



1 Cadillac franchises and differently with respect to the Chevy  
2 franchise. I think the dealer's sales and service agreements  
3 have to be read separately. Each stated that it was executed  
4 by GM "separately" on behalf of its division identified in the  
5 specific addendum. And each dealer agreement provided that the  
6 agreement for each line make is independent and separately  
7 enforceable by each party and the use of the common form is  
8 intended solely to simplify execution of the agreements. So I  
9 think that in light of that, Rally had five franchise  
10 agreements under which the arbitrator's ruling focusing on each  
11 brand separately would be more than merely reasonable. If  
12 otherwise warranted by the underlying facts, it would be right.

13 For the foregoing reasons, New GM is to settle an  
14 order in accordance with the foregoing as quickly as reasonably  
15 possible, that order to be settled on no less than two business  
16 days' notice by hand, fax or e-mail. I assume that New GM will  
17 use one of those methods so I don't have to provide for an  
18 alternative mechanism if it were to use snail mail. The time  
19 to appeal from this determination will run from the time of  
20 that order's entry and not from the time of this dictated  
21 decision.

22 All right. Not by way of reargument, are there any  
23 matters that I failed to address or any questions?

24 MR. SNYDER: No, Your Honor.

25 THE COURT: Hearing none, we're adjourned. Good

1 evening, folks.

2 MR. SNYDER: Your Honor, if I may just quickly?

3 THE COURT: Yes, Mr. Snyder?

4 MR. SNYDER: Your Honor, under Bankruptcy Rule 8005,  
5 to the extent we seek a stay pending appeal and that would be a  
6 necessary predicate for an award, for the reasons set forth in  
7 our papers and in the oral argument, I request -- am making  
8 this oral application for a stay of Your Honor's order pending  
9 appeal.

10 THE COURT: I'll accept the oral application for a  
11 stay but we'll do it after a ten minute recess. And each of  
12 you can make your points at that point in time.

13 MR. SNYDER: Thank you, Your Honor.

14 (Recess from 6:19 p.m. until 6:37 p.m.)

15 THE COURT: Have seats, please. Okay. Mr. Snyder,  
16 your application for a stay.

17 MR. SNYDER: Thank you, Your Honor. Your Honor, in  
18 your decision, I believe the Court stated -- and I apologize if  
19 I'm putting words in the Court's mouth -- that areas such as  
20 manifest disregard for the law and fraud were not areas that  
21 were alleged here. And that might be properly the province if  
22 not exclusively the province of the district court in  
23 California. And I would ask the Court to turn to, Your Honor,  
24 Exhibit I which is Rally's petition to modify. And in Exhibit  
25 I, Your Honor, starting on page 10, whether appropriately or

1 not, Rally uses the Federal Arbitration Act as a guide as to  
2 what the district court can look to when determining whether it  
3 has jurisdiction. And it starts at the bottom of page 10, and  
4 I'm quoting, "that the arbitrator in this matter was guilty of  
5 misconduct, misbehavior and exceeded his power, i.e., manifest  
6 disregard by ruling on a matter not submitted for determination  
7 and, (2) attempting to fashion a remedy not authorized by  
8 Section 747 of the Act." And the argument goes on and a little  
9 farther down, it addresses corruption, fraud and undue means by  
10 GM which, again, although it mirrors a section of the FAA, is  
11 also grounds that Rally sought in the California district court  
12 in order to vacate and modify the arbitration. So I wanted the  
13 record clear that the manifest disregard of the law, fraud and  
14 the usual grounds that a party would seek whether under a state  
15 statute or the federal arbitration statute to undo the  
16 arbitration were pled by Rally in the California action. And  
17 so, I believe that those types of matters, and I believe Your  
18 Honor pointed this out, matters of manifest disregard, fact and  
19 law as well as fraud, corruption, mistake and exceeding powers  
20 are matters that the California district court should hear --  
21 can hear, excuse me, and should hear.

22 Your Honor, has basically said that you have sole and  
23 exclusive jurisdiction even though the district court may have  
24 jurisdiction over these matters. And as respectfully submitted  
25 that the Court may have concurrent jurisdiction but over

1 matters such as manifest disregard of the law that the federal  
2 district court in California also has jurisdiction over this  
3 matter. And it's properly before it now.

4 With respect to the federal question, again, Your  
5 Honor seemed to indicate in his decision that the sole and  
6 exclusive jurisdiction was given to the bankruptcy court as a  
7 result of the wind-down orders. The Court did not address as  
8 we go through in detail, starting at page 28 of our objection,  
9 the decision of the Supreme Court in Vaden v. Discover Bank.  
10 And I alluded to it, Your Honor, in the original argument. But  
11 the Supreme Court, overturning, I believe, four circuit courts  
12 in Vaden, specifically held that they can look through the  
13 petition to look at the parties' underlying substantive  
14 controversy. And, Your Honor -- and this is where the Court  
15 and Rally might differ. The substantive controversy, the  
16 predicate of the petition arises under the Dealer Arbitration  
17 Act. It does not arise under the wind-down agreement because  
18 it was created not from the wind-down agreement but the Dealer  
19 Arbitration Act. So I think there's compelling reasons as a  
20 result of the recent Supreme Court case in Vaden to allow the  
21 federal district court to hear a federal controversy arising  
22 out of a federal statute. And I've been practicing here for a  
23 long time, Your Honor. To the extent that it's an issue  
24 involving a purchaser wanting to get its -- the value of what  
25 it bargained for, we are not saying this Court does not have

1 jurisdiction. The Court has already held that it has arising-  
2 to jurisdiction and it may well have that jurisdiction.

3 But I think I've pointed to at least two, the federal  
4 question issue as well as the due process constitutionality  
5 issue as to why the California district court has strong --  
6 strong subject matter -- rights to exercise its subject matter  
7 jurisdiction. This is not a cursory -- a statute that only  
8 cursorily affects the federal court, but it directly affects  
9 the federal court. And I believe, Your Honor, for those  
10 reasons, the Court not entertaining or analyzing that and then  
11 not seeing that the petition itself does seek -- does allege  
12 manifest errors of law as well as fraud and improper powers by  
13 the arbitrator that we would be successful on the merits. And  
14 we would be able to, Your Honor, obtain a stay of Your Honor's  
15 order to the extent it would give us additional time to seek a  
16 stay or to seek a determination in either the district court  
17 here or in California.

18 THE COURT: Well, I understand your desire to go to  
19 the district court here. I have more trouble trying to go to  
20 the district court in California. In fact, that walks, talks  
21 and quacks a lot about the actions that Judge Weinfeld found so  
22 objectionable in Teachers Insurance v. Butler before the Second  
23 Circuit said what it said in Teachers Insurance v. Butler where  
24 there was never to collaterally attack his judgment by going to  
25 another court. I mean, I don't claim to be infallible, Mr.

1 Snyder, but it seems to me that if somebody's going to say that  
2 I'm wrong, it's got to be either the district court or the  
3 Second Circuit.

4 MR. SNYDER: Your Honor, we were in front of the  
5 California district court before GM was here. We can always go  
6 back to the filing of the bankruptcy case. But this is clearly  
7 different than Teachers. Here, we have already commenced an  
8 action in the California district court. We're not forum  
9 shopping and running to California because we don't like what  
10 the Court is saying. We deferred in this case because they  
11 made the motion that we were going to defer to the bankruptcy  
12 court before we took any action in California. But we're not  
13 looking around for a second bite of the apple. We're already  
14 in California. Issues already been joined. They've already  
15 answered. So we're at summary judgment stage anyway in  
16 California and we have a ticking clock of October 31st. That's  
17 very different than going to another Court when you don't like  
18 what this Court has to say, Your Honor. I mean, I don't know  
19 if we need to address that here. But that's not what we're  
20 looking to do. It's for powers other than I to decide whether  
21 we seek a stay here or we go back to the Court where there's  
22 been a complaint and answer filed and seek a stay there. I'm  
23 being straightforward with the Court. It's not our intent and  
24 I know the Court might have discomfort with that, but the  
25 action was already commenced there. And that's what led to GM

1 coming here.

2 THE COURT: Well, forgive me, Mr. Snyder. The reason  
3 that you can truthfully say it's discomfort is because I try  
4 very hard to consume my anger and to maintain my demeanor. I  
5 fully understand the rights of any litigant before me to take  
6 me up the street. But going to another Court right after  
7 you've litigated before me for the last three hours and I've  
8 given you a ruling which may or may not be right but which was  
9 after a lot of thought and effort is one that is more than a  
10 source of discomfort.

11 Why don't you continue with the remainder of the  
12 three bullets on the applicable case law on an entitlement to a  
13 stay and address, if you will, what you're prepared to offer in  
14 the way of a bond if I grant a stay?

15 MR. SNYDER: Your Honor, the argument with respect to  
16 the constitutionality -- I had made the argument with respect  
17 to whether a federal question exists vis-à-vis the  
18 interpretation of the federal statute and going behind the  
19 arbitration. I made as well -- I would point out, Your Honor,  
20 actually there are four grounds. The third one is diversity.  
21 And I think although GM was silent on it, the Court, I believe,  
22 in its decision, admitted that diversity exists but, again,  
23 stated that the sale order would trump the district court even  
24 though diversity might existed there. And the fourth argument,  
25 Your Honor, is 48(c) and Your Honor is correct. It does just

1 refer to judgment. It does not refer to the right to vacate or  
2 amend or to modify. It's respectfully submitted, though, Your  
3 Honor, that the district court can make that decision as well.  
4 Your Honor may be right in all they can do is say thumbs up or  
5 thumbs down with respect to a judgment. But at least with  
6 respect, I believe, to the fifty state laws, with respect to  
7 arbitration and the FAA, it's not so limited, that applicants  
8 are usually allowed by statute, certainly under the FAA, to not  
9 only seek a judgment but to modify or vacate. But that's  
10 something the California district court may hold as well, Your  
11 Honor.

12 And because there are five sep -- four separate  
13 grounds, the constitutionality, the federal question, the  
14 diversity and Rule 48(c), in Rally's mind, is more than a  
15 compelling reason to hold that concurrent jurisdiction exists  
16 and not simply exclusive jurisdiction exists. That Your  
17 Honor's sale order says what it says but that the Arbitration  
18 Act raises issues that need to be addressed. And it's  
19 submitted by saying diversity exists but the sale order trumps  
20 it, Your Honor, I would suggest that the district court in  
21 California does have jurisdiction and does also have the  
22 authority to hear these issues. And for those reasons, I think  
23 the Court or Rally would be successful in arguing that it would  
24 be successful on the merits on those four particular grounds.

25 I would state also, Your Honor, that the judicial



1 estoppel argument is just fascinating to me. I -- you asked a  
2 question of GM and it was your last question, I believe, which  
3 was are you saying you could have gone to New York or  
4 California but you decided to go to California. And they said  
5 yes. And so, what they're basically saying is we can go to  
6 California or New York but you can't. And that argument is, in  
7 essence, saying we've waived subject matter jurisdiction by  
8 entering into the wind-down agreements. And I don't believe  
9 that's correct. And I believe if GM can go into New York and  
10 California then Rally can go into New York and California. And  
11 to simply say that we're -- our fortunes rise and fall here,  
12 well, neither -- GM's fortunes didn't rise and fall here  
13 either. They chose not to come here. And so I think we should  
14 have that same right.

15 And for those reasons, Your Honor, we'd like a stay  
16 of Your Honor's order until there is an appropriate order of  
17 the district court.

18 THE COURT: All right. Mr. Steinberg?

19 MR. STEINBERG: Your Honor, in the context of the  
20 order that you've indicated that you will enter, a stay pending  
21 appeal makes no sense. And the whole oral argument that you  
22 heard here before was really a reargument motion and was not a  
23 stay pending appeal motion.

24 Your Honor has indicated that it was inappropriate  
25 for them to go to California and to continue to prosecute the

1 action in California. So if you're going to stay the entry of  
2 the order, what does that mean as a practical matter? After  
3 having ruled that it was improper to go to California, he now  
4 is actually asking you to stay that order so he can go to  
5 California? Which is 180 degrees of the relief you just  
6 granted? This is not like he has a judgment and he wants to  
7 stop us from enforcing the judgment because he wants to take  
8 his appellate rights. I'm trying to collect on a monetary  
9 judgment. This is started because he shouldn't have gone to  
10 California in the first place. He shouldn't have violated the  
11 wind-down agreement. He should have done -- he didn't have a  
12 judicial right. And now he's asking Your Honor to stay it so  
13 he can, in effect, do what he started to do which was the  
14 reason why we brought the motion in the first place.

15 But I think he didn't answer your question what are  
16 the four prongs for a stay pending appeal. He did talk about  
17 the likelihood of success on the merits. And I don't think he  
18 said anything today other than try to reargue what Your Honor  
19 had just ruled upon as to the likelihood of success on the  
20 merits.

21 Frankly, the other three grounds all, I think, favor  
22 New General Motors. The harm to the appellant -- well, on the  
23 surface, one could say he's harmed because the Chevrolet  
24 dealership will be terminated on October 31st. The actual harm  
25 is that he didn't have a judicial right and you're not

1 depriving him of a judicial right. Conversely, the harm to  
2 others being the appellee, which is New General Motors and the  
3 new dealership, are dramatic if Your Honor's order is not  
4 enforced. And Your Honor's opinion addressed the public  
5 interest element which is the necessity of protecting buyers in  
6 a Section 363 order and the Court's exclusive jurisdiction and  
7 the public interest that's involved there.

8 I think the only other thing I would add, and it has  
9 nothing to do with the stay pending appeal other than the  
10 likelihood of success, I'll just point out that he wants to  
11 refer to the complaint that was -- the petition that was filed  
12 by Rally in California. On the corruption, fraud and undue  
13 means by General Motors, that's just a label that he put on a  
14 caption in a petition. He does not allege one thing about  
15 fraud corruption in connection with the arbitration process.  
16 He's saying that there were public statements made by Fritz  
17 Henderson as to, in general, the importance of a dealership  
18 network, and he's saying that that was misleading. But it has  
19 nothing to do with actually what happened in the arbitration  
20 and under the Dealer Arbitration Act. And as far as the  
21 misconduct being beyond prec -- established precedent, if you  
22 read the paragraph, what he's saying is that the award goes  
23 beyond Section 747 because they believe that that statute,  
24 which is absolutely silent on the issue, doesn't allow for the  
25 assumption of one dealership -- the rejection of one dealership

1 agreement and the assumption or the reinstatement for the other  
2 three. That's the misconduct of going beyond what is  
3 established precedent.

4 Your Honor's decision ruled that if you had to  
5 address the merits, even though you weren't, you thought that  
6 New GM and the arbitrator was right on that issue. So he can  
7 point to a petition, which is based on the Federal Arbitration  
8 Act, citing standards but have no application to the facts of  
9 this case and then everything else on the standards for a stay  
10 pending appeal warrant for the denial of the stay.

11 And he purposely didn't answer your question as to a  
12 bond because, at this point in time, the bond -- we're not  
13 looking for a bond. We're looking for the relief that we  
14 brought our motion for. And a stay pending appeal is, in  
15 effect, a denial of our motion which Your Honor just granted.

16 (Pause)

17 THE COURT: Stand by, everybody. Sit in place.

18 (Pause)

19 THE COURT: Gentlemen, in this supplemental  
20 proceeding, Rally moves by oral motion, with my consent, for a  
21 stay pending appeal. And I am granting its motion to the  
22 extent of providing for a seven calendar day stay to permit  
23 Rally to go to the district court in this district. And the  
24 motion is otherwise denied. The following are the bases for my  
25 exercise of discretion in this regard.

1           Though I have no memory of hearing it expressly  
2           invoked, a motion of this character is governed by Federal Rule  
3           of Bankruptcy Procedure 8005. It provides in relevant part  
4           that "A motion for a stay of the judgment order or decree of a  
5           bankruptcy judge for relief pending appeal must ordinarily be  
6           presented to the bankruptcy judge in the first instance...A  
7           motion for such relief" granted by -- "or for modification or  
8           termination of relief granted by a bankruptcy judge may be made  
9           to the district court but the motion shall show why the relief,  
10          modification or termination was not obtained from the  
11          bankruptcy judge. The district court...may condition the  
12          relief it grants under this rule on the filing of a bond or  
13          other appropriate security with the bankruptcy court."

14           As the language I just quoted makes clear, the rule  
15          is not terribly helpful with respect to the standards for  
16          considering a motion of that character. Rather, for that, we  
17          look to the case law which, in the bankruptcy appellate arena,  
18          takes a considerable amount of guidance from similar issues  
19          presented under the FRAP, the Federal Rules of Appellate  
20          Procedure.

21           I exercise my discretion in accordance with my  
22          earlier decision, coincidentally in General Motors, at 409 B.R.  
23          24, and the affirmants by Judge Kaplan of the district court in  
24          2009 U.S. District Court Lexis 61279. As I stated in my ruling  
25          there, in GM, the decision as to whether or not to grant the

1 stay of an order pending appeal lies with the sound discretion  
2 of the Court. See, for example, In re Overmyer, 53 B.R. at  
3 955. Though the factors that must have to be satisfied have  
4 been stated in slightly different ways and sometimes in a  
5 different order, it's established that to get a stay pending  
6 appeal under Rule 8005, a litigant must demonstrate it would  
7 suffer irreparable injury if a stay were denied; there is a  
8 substantial possibility, although less than a likelihood of  
9 success on the merits of a movant's appeal; other parties would  
10 suffer no substantial injury if the stay were granted; and that  
11 the public interest favors a stay. See, for example,  
12 Hirschfeld v. Board of Elections, 984 F.2d at page 39. It's a  
13 decision of the Second Circuit in 1992; In re DJK Residential,  
14 2008 U.S. Dist. LEXIS 19801; and 2008 WL 650389, a decision by  
15 Judge Lynch back when he was a district judge; and In re  
16 Westpoint Stevens, 2007 U.S. Dist. LEXIS 33725, 2007 WL  
17 1346616, a decision by Judge Swain of the district court.

18 The burden on the movant is a "heavy one". See, for  
19 example, DJK at \*2. See also U.S. v. Private Sanitation  
20 Industrial Assoc., 44 F.3d 1082 at page 1084, another decision  
21 of the Second Circuit. To be successful, the party must "show  
22 satisfactory evidence of all four criteria". In re Turner, 207  
23 B.R. at page 375, a decision of the former Second Circuit BAP  
24 in 1997. Moreover, if the movant seeks the imposition of a  
25 stay without a bond, the applicant has the burden of

1 demonstrating why the Court should deviate from the ordinary  
2 full security requirement. See DJK at \*2, Westpoint Stevens at  
3 \*4.

4 While, as Judge Lynch noted in DJK, the Second  
5 Circuit BAP has held that the failure to satisfy any prong of  
6 the four-circuit test "will doom the motion," with Jerry Lynch  
7 having cited Turner. The Circuit in more recent cases have  
8 engaged in a balancing process with respect to the four factors  
9 as opposed to adopting a rigid rule. In my earlier ruling in  
10 GM, I assumed without deciding that the balancing approach  
11 would be more appropriate. And I'm going to do likewise here.  
12 I also note that when Judge Kaplan affirmed me in GM in the  
13 decision that I described a few minutes ago, I think he took a  
14 similar approach.

15 Let me start with injury first. Obviously, I take  
16 the loss of a franchise seriously. And indeed, early in the  
17 decision that I dictated -- I guess it's now an hour or an hour  
18 and a half ago -- I did hopefully express my empathy to dealers  
19 losing their franchises. However, what caused the lack of the  
20 franchise, or the loss of the franchise, is not the ruling that  
21 I issued tonight. It was the dealer termination agreement that  
22 was entered into over a year ago. What we have here is  
23 Congress recognizing the injury to dealers as a consequence of  
24 either rejection of dealership agreements, as was the case in  
25 Chrysler, or even the soft landing termination agreements that

1 we had here, provided dealers with an arbitration remedy to, in  
2 essence, undo that which otherwise would happen. And Rally  
3 took advantage of that and it won in three-quarters -- or four-  
4 fifths -- Pontiac, I guess, ultimately not being relevant -- of  
5 the matters which it took before the arbitrator. Now, in  
6 essence, what it's asking for is to avoid the injury from a  
7 year ago and at the same time to avail itself of the benefits  
8 of the arbitration to the extent that it won. With it having  
9 won with respect to Buick, Cadillac and GMC, I don't think  
10 there is irreparable injury to it by reason of its not having  
11 shot the moon in its litigation efforts before the arbitrator.

12 Frankly, folks, I tried very hard to get it right.  
13 And we're going to get to a likelihood of success in a minute.  
14 But I do not believe that my ruling today causes irreparable  
15 injury. And I think really all we're talking about is the  
16 results of an arbitration system that was made available for  
17 Rally and for which it only succeeded in part.

18 I will, however, assume that there is a -- at least a  
19 peppercorn of irreparable injury. I'm certainly not going to  
20 disqualify Rally for not showing more in the way of irreparable  
21 injury. And I'm not, as I indicated, going to require it to  
22 make a strong showing on all fours. I am going to take a  
23 balancing approach so I'm going to turn to that next.

24 So let's talk then about likelihood of success which  
25 is where Rally spent the bulk of its argument. Although we



1 talk about likelihood of success, that's a shorthand for a more  
2 nuanced analysis. The technical standard is there is a  
3 substantial possibility although less than a likelihood of  
4 success on the merits. Well, let's slice and dice the various  
5 aspects of my earlier ruling.

6 First, the propriety of my conclusion that I do have  
7 subject matter jurisdiction and that I have core  
8 jurisdiction -- core, of course, not being the subject matter  
9 jurisdiction issue but talking about the power of a bankruptcy  
10 judge in contrast to a district judge to decide. Those two  
11 rulings now seem to be accepted or at least unchallenged. And  
12 although there was no express discussion of my decision not to  
13 abstain, I didn't hear any argument on that. And, frankly,  
14 discretionary abstention is called discretionary for a reason.  
15 There would have to be an abusive discretion in my electing not  
16 to abstain. And I think that there would not be a material  
17 likelihood of success on that and would be far short of a  
18 substantial possibility.

19 On the merits, it's undisputed that we're not talking  
20 about the Federal Arbitration Act, that the Dealer Arbitration  
21 Act provides no right to appeal. And my ruling did not go so  
22 far as to say that under no circumstances under anything that  
23 might ever be alleged would I deny the right to appeal. What I  
24 have said is that to the extent, if any, to which there would  
25 be such a right, a construction to, in essence, save the

1 constitutional of the statute if it were otherwise put in  
2 question, there would have to be something seriously wrong with  
3 the arbitration in the way of fraud, corruption, bribery being  
4 a species of corruption, or, and I articulated it differently,  
5 disregard of applicable authority. I went on to provide two  
6 additional levels -- you can call it dictum; you can call it  
7 alternative grounds, whatever, which caused me to believe that  
8 it's not likely that there's going to be a reversal.

9 And as far as whether there's a substantial  
10 possibility, on the facts that were put before me, I don't  
11 think there's even that. To be sure, words were put before the  
12 district judge triggering responses that if this were an action  
13 under the Federal Arbitration Act would get a judge's  
14 attention. But as the recent decisions by the Supreme Court in  
15 Bell Atlantic v. Twombly and, especially, Ashcroft v. Iqbal  
16 tell us, just invoking words making conclusory allegations in a  
17 pleading isn't enough. You can't talk about corruption without  
18 giving the Court some facts as to lead the Court to believe  
19 there was corruption. And we're not talking about corruption  
20 by GM. We're talking about corruption by the arbitrator. I  
21 used the example before of taking bribes. There are no  
22 allegations of ex parte communication. There are no  
23 allegations of any irregularities in the proceedings before the  
24 arbitrator other than the assertion that, as a matter of law,  
25 the arbitrator got it wrong. And even then, there's no

1 allegation that the arbitrator disregarded any particular case  
2 that would suggest to the arbitrator that he got it wrong. So  
3 while I think there would be a substantial possibility of  
4 success on appeal if I were somehow to rule that there is no  
5 right to appeal and that I got to close my eyes to  
6 irregularities of the type that I just described if they were  
7 shown, it doesn't affect the outcome here because I don't have  
8 any facts suggesting any of those things. Bottom line, folks,  
9 I do not find a substantial possibility.

10 Third factor. Other parties would suffer no  
11 substantial injury if the stay were granted. And here, I think  
12 there are potential injuries, at least if we go past October  
13 31st, of one type, for sure, and another which more properly  
14 may be regarded as being a public interest concern rather than  
15 a private prejudice. For GM's benefit, I'll say that I see no  
16 prejudice in staying for five days to allow the district court  
17 to second guess me on the stay application. And for that  
18 reason, I am going to grant a stay to the extent of five days.

19 But we have a new dealer who's taking over on the  
20 31st of October. I don't have evidence on it, but I got to  
21 assume that the existing franchisee's gain is going to be the  
22 new one's loss. They're either going to be competing with each  
23 other or that other guy is going to be made to wait if this  
24 thing can't proceed past October -- if this somehow proceeds  
25 past October 31st. And we have a nationwide program which was

1       judicially blessed back in July of last year for these dealer  
2       unwinds and I think it's prejudicial to New GM to put this  
3       system in play to any greater extent than Congress did by its  
4       statutory enactment. And Congress didn't say everything you're  
5       doing is undone. What it did was say well, we're going to set  
6       up this arbitration mechanism. And that's exactly what we got.  
7       And it goes without saying that I comply with the congressional  
8       but I don't think we should be going beyond what Congress said.

9               Lastly, the public interest favors a stay. That's  
10       the final factor. While I quoted the language before, and I  
11       think Rally acknowledged its importance, that we deliver to the  
12       purchasers of assets in bankruptcy sales that which we have  
13       promised. And if and to the extent that the counterparty to a  
14       deal with an estate comes back and says I need you to enforce  
15       it so I get the benefit of what I had bargained for, we do  
16       that.

17               I talked back at the time of the original 363  
18       determination and my separate ruling on the stay application  
19       that followed my 363 ruling by a couple of days about how  
20       important GM's survival is to the public interest and the  
21       interest not just of the federal taxpayers but the needs and  
22       concerns of the states of Michigan and Ohio and the communities  
23       in which GM plants operate. We made decisions then about that  
24       which was necessary to give New GM the maximum opportunity to  
25       thrive. We made rulings then which are res judicata. I don't

1 think the public interest is served by interfering with what we  
2 then put in place in any way.

3 Certainly, there is no public interest in allowing  
4 this collateral attack. It's a private interest to the extent  
5 it's any interest. And when a party that was offered and  
6 availed itself the opportunity to arbitrate then wishes to take  
7 the portion for which it did not win and put the earlier system  
8 in play beyond getting the arbitration opportunity for which  
9 Congress provided, that is, at the least, not in the public  
10 interest and may fairly be regarded as being contrary to the  
11 public interest. At best, looking at it most favorably to  
12 Rally, it is a wash because it is private interests that are  
13 being sought to be advanced and not public ones.

14 So, as my discussion indicates, folks, I think we got  
15 to go by the book and deal with it as I did in my decision  
16 dictated just a moment ago by the four enumerated factors  
17 articulated in the case law for the grant of a stay. And it is  
18 stayed to permit a second opportunity to go to the district  
19 court for those seven calendar days. And so as not to put a  
20 gun to the head of the district court having to issue a  
21 decision, like Judge Kaplan did where he had to work all night  
22 on it, I don't want to do that to the district court again if I  
23 can avoid it.

24 But beyond that, it is denied. Rally is authorized  
25 and requested, not ordered, but requested to advise the

1 district court that an application was made to the bankruptcy  
2 court, that the bankruptcy court denied it except to the extent  
3 of the five days for the reasons that it dictated into the  
4 record and that any further application to the bankruptcy court  
5 is dispensed with and waived. From now on, we're in the  
6 district court, folks.

7 Yes, sir?

8 MR. STEINBERG: Your Honor, I just have some brief  
9 moments and I thank you for staying so late for today. In your  
10 presentation in connection with the stay pending appeal, you  
11 said seven calendar days but I believe you also said at one  
12 point in time five days. So --

13 THE COURT: If I did, it was a reference to five  
14 business days. Seven calendar days transposes into five --

15 MR. STEINBERG: Okay.

16 THE COURT: -- business days. And ever since we  
17 amended the federal rules of many different types last  
18 December, we now go on bunches of seven calendar days.

19 MR. STEINBERG: The second thing, Your Honor, is that  
20 while I'm not exactly sure what I would have otherwise done  
21 during the seven calendar day period because the wind-down  
22 agreement is fairly passive, I do want to make sure that I'm  
23 still able to present to Your Honor the order that you had  
24 asked for --

25 THE COURT: Of course you can.

1 MR. STEINBERG: Okay. And I think that's it. I  
2 understand that the only activity that will happen from this  
3 point on is in the district court of this district.

4 THE COURT: Correct. All right. It's been a long  
5 day. Good evening, gentlemen. We're adjourned.

6 (Whereupon these proceedings were concluded at 7:23 p.m.)

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I N D E X

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

\_\_\_\_\_  
LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET\*\*D-486)

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Date: October 6, 2010

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